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CASES AT LAW

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA,

AT JUNE TERM, 1848.

DANIEL FREEMAN *vs.* DOCTOR M. LISK & AL.

After a debtor, arrested upon a *ca. sa.* has given bond with sureties to take the benefit of the insolvent debtors' act, and has joined in an issue tendered by the plaintiff upon a suggestion of fraud, it is too late for him or his sureties to bring forward an exception to the writ of *ca. sa.* under which he was arrested.

Where a debtor, alleging that he is insolvent, appears in Court, under an arrest and bond given, he can only be discharged by taking the oath prescribed by law, or by the act or consent of the creditor.

If an issue of fraud has been made up, there can, upon that, be no non-suit. The cases of *Dobbin* v. *Gaster*, 4 Ired. 71, and *Hawkins* v. *Hall*, 3 Ired. Eq. 280, cited and approved.

Appeal from the Superior Court of Law of Montgomery County, at February Term, 1848, his Honor Judge BAILEY presiding.

The plaintiff obtained a judgment against the defendant Lisk, for the sum of thirty-four dollars forty cents, ($34 40,) with interest from the 6th day September, 1838, on a warrant from a Justice of the Peace, whereupon a *capias ad satisfaciendum* issued, dated the 10th day of January, 1845, upon which the defendant was arrested and gave bond for his appearance at the Court of Pleas and Quarter Sessions, to be held for said county, on the 1st Monday of April, 1845, with Thomas Williams, Green Smith, and Alexander Zachary as his sureties; and, at said term, the defendant proposed to take the oath prescribed for the relief of insolvent debtors, which was objected to by the plaintiff, and thereupon an issue of fraud was made up; and there being no trial by jury in the County Court, the case was transferred to the Superior Court for trial, and, at February term, 1846 of that Court, the defendant, Lisk, appeared, and by his counsel moved to non-suit the plaintiff. The plaintiff was then called and a non-suit entered of record. At the subsequent term of the Superior Court, viz: at August term, 1846, the plaintiff offered an affidavit, that he had employed an attorney to attend to his cause against the said Doctor M. Lisk, and that his said attorney had omitted to enter an appearance for him. Whereupon, the Court ordered, that the cause be reinstated. The cause was not reached, and was continued at that term, and continued until Spring term, 1848. The cause then being called, the plaintiff's counsel had the defendant Lisk called, and he failing to appear, moved the Court for judgment against him and his sureties. This was opposed by the defendant's counsel, who objected, first, because of the invalidity of the *ca. sa.* 2dly, because the Court had no power to set aside the non-suit upon the affidavit made, and reinstate the case upon the docket. These objections were over-ruled by the Court, and judgment given against the defendant, Lisk, and his sureties, for the sum of fifty-two dollars and thirty-one cents

to be discharged upon the payment of thirty-one dollars and eleven cents, and costs.

From which judgment the defendants prayed an appeal to the Supreme Court, which was granted.

No counsel appeared in this Court for the plaintiff.
Iredell, for the defendants.

BATTLE, J. The first objection urged in the Court below to the rendition of a judgment against the defendants, cannot be sustained. After giving bond with sureties for his appearance in Court to take the benefit of the Act passed for the relief of insolvent debtors, and joining in an issue tendered by the plaintiff upon a suggestion of fraud, it is too late for the debtor or his sureties to bring forward an exception to the writ of *ca. sa.* under which the arrest was made. It was so decided in the case of *Dobbin* v. *Gaster*, 4 Ired. Rep. 71, where the time and manner of taking such an exception are pointed out, and where the reasons, why it cannot be urged with success, unless taken in apt time, and by a proper mode, are fully and clearly stated.

The other objection was founded upon a mistaken apprehension of the effect of the judgment of non-suit, rendered against the plaintiff at Spring term, 1846. That judgment was irregularly and improvidently given, and was properly set aside, upon the application of the plaintiff at the ensuing term of the Court: for, this being a proceeding upon final process, a judgment of non-suit could not in a technical sense have been given. After a debtor, who has been arrested under a writ of *ca. sa.* has given bond for his appearance in Court to obtain the benefit of the Act for the relief of insolvents, he must pursue the course prescribed in the Act, in order to entitle him to take the oath and be discharged. The creditor, who is to be affected by his discharge, has a right, if he chooses to avail himself of it, to be present to see whe-

ther all the requisitions of the law have been complied with, and to object to the discharge, if they have not. If fraud be suggested by the creditor and an issue made up to try the specifications, the plaintiff may insist upon the trial, or he may withdraw, or perhaps by his neglect abandon the issue, but neither a withdrawal, nor an abandonment of the issue, will render it unnecessary for the defendant, the debtor, to take the oath, or entitle him to be discharged without taking it. The failure of the plaintiff to appear, when the cause is called for trial, is not a ground for a judgment of non-suit against him; and the utmost effect it can have will be to give to the defendant the right to have a jury empannelled, to try the issue and to have a verdict found in his favor, for the want of testimony on the part of the plaintiff; or perhaps to treat it as a withdrawal or waiver of the issue by the plaintiff, so as to enable him to take the oath and be discharged. Unless he obtain his liberty by the act or consent of the plaintiff, which will be a satisfaction of the debt, (*Hawkins* v. *Hall*, 3 Ired. Eq. Rep. 280,) he can be discharged from liability on his bond only by taking the oath, and he must be prepared to do so, whenever in the regular course of the business of the Court, he is called upon for that purpose, and if he fail to appear, when so called, his bond is forfeited, and judgment may be entered against him and his sureties.

His Honor therefore did right in over-ruling the defendants' objections, and the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

WILLIAM S. ASHE *vs* ALEXANDER MURCHISON.

An agent, as such, is not necessarily incompetent to testify for his principal. He can only be excluded on the ground of interest.

Where a principal is sued for the negligence of an agent, a *prima facie* case of responsibility to his principal should be shewn, before the agent is excluded as a witness, and then the principal ought to be permitted to examine him on his *voire dire*, to explain his real situation.

Appeal from the Superior Court of Law of New Hanover County, at the Special Term in January, 1848, his Honor Judge MANLY presiding.

This was an action on the case against the defendant, Alexander Murchison, as the owner of a raft of timber, to recover damages for an injury done by said raft to a toll bridge, the property of the plaintiff, William S. Ashe. The declaration stated, that the plaintiff was the owner of a certain bridge over the North Eastern branch of the Cape Fear River, about a mile and a half above the town of Wilmington, and entitled to collect toll from passengers crossing the same: And that the defendant being the owner of a large raft of lumber, carelessly, improperly, and negligently permitted his said raft to strike against the said bridge belonging to the plaintiff, so as to break down and destroy a large part thereof, &c. Plea, Not guilty.

John Mills, a witness called by the plaintiff, testified, that on the —— day of November, 1845, about a little before sunrise, he was at the bridge of the plaintiff, when he observed a very large raft of lumber, within twenty feet of the bridge, and coming against it on the flood tide. No person was on the raft, and it struck the bridge and carried away sixty-eight feet of it. On one end of the raft there was a piece of grape vine, which

looked as though it had been cut. He believed there was a small piece of rope at the other end of the raft, but as to this he was not positive. He further testified, that the bridge was the property of the plaintiff, he being then in possession of it, and collecting toll from passengers.

M. Lewis was then called, as a witness for the plaintiff. He testified, that during the day, on the morning of which the raft had struck the plaintiff's bridge, as testified to by the first witness, or during the next day, he was at the bridge, when one H. McKeller (who it was admitted was the agent of the defendant,) came to the bridge for the purpose of securing the raft and carrying it to Wilmington: That, while at the bridge and on the raft, he, McKeller, said, that the raft was the property of the defendant, who resided in the county of Cumberland. He further testified, that the raft was one of the largest he ever saw: and that the bridge was the property of the plaintiff who had been in possession of it, and receiving toll from passengers over it for many years. In answer to questions by the defendant's counsel, he stated, that the stream, over which the bridge was built, was a navigable stream, and that the bridge had been broken three or four times by rafts or flats.

The plaintiff then introduced one P. Tilley, who testified, that he was at the bridge with the plaintiff, while the raft spoken of was lying against it, and McKeller, defendant's agent, was on the raft: That some conversation ensued between the plaintiff and said McKeller, in which McKeller remarked, "he did not care a damn, if the raft had broken down the whole of the bridge." This testimony was objected to by the defendant, but admitted by the Court.

Other witnesses were examined, who testified as to the extent of the damages done to the bridge.

The defendant then offered H. McKeller as a witness. The examination of the witness was objected to by the

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plaintiff, for the reason that the witness, being the admitted agent of the defendant, was responsible over to the defendant for the damages, which the plaintiff might recover in this suit, and that the witness was therefore interested in defeating the recovery of the plaintiff. The Court refused to permit the witness to be examined. The defendant's attorney of record offered to release or discharge the witness from any liability, which he might be under to the defendant: but the Court was of opinion, that the attorney of record could not execute such a release for the defendant. The defendant then offered to examine the witness on his *voire dire*, to show the extent of his agency, and that he would not be liable over to the defendant. This was also refused by the Court.

The defendant insisted, and so asked the Court to charge the jury—

First—That if the plaintiff's bridge was erected over a navigable stream, used by the public in conveying their produce to market, he must shew a right to such bridge by grant or otherwise.

Secondly—That if the plaintiff's bridge, erected over a navigable stream, had been built in a weak and insecure manner, so as to be liable to be broke down by ordinary rafts, it was the plaintiff's own folly and he could not recover.

Thirdly—That if the injury resulted from pure accident, and without any negligence on the part of the defendant, then it was a case of loss without injury, and the plaintiff could not recover.

The Court charged the jury upon the first point: That for the purposes of this action, so far as the plaintiff's title to the bridge was involved, it was sufficient for the plaintiff to show, that he was in the peaceable possession of the bridge and receiving the tolls.

Upon the second point he charged, That if the bridge was weak, it only affected the measure of damages, but not the plaintiff's right to recover.

And upon the third point, That to entitle the plaintiff to recover, he must satisfy the jury, that there was negligence on the part of the defendant, either by himself or his agent—defendant being bound to use ordinary care and diligence in the management of his raft: That the testimony made out a *prima facie* case of negligence in the defendant, in permitting his raft to drift at large on the river, without any person in charge of it, whereby the plaintiff was injured, and it was for them to say, whether the defendant had explained this *prima facie* evidence of negligence on his part, by showing that the condition and situation of the raft was the result of accident, which could not have been avoided by ordinary care on his part. And the whole circumstances were submitted to the jury.

The jury returned a verdict in favor of the plaintiff. Whereupon, a rule upon the plaintiff was granted, that he should show cause why a new trial should not be granted, upon the ground of misdirection, and the rejection of proper evidence: and upon argument the rule was discharged and the judgment given according to the verdict. The defendant prayed an appeal, which was allowed.

Strange, for the plaintiff.

D. Reid and *W. Winslow*, for the defendant, contended:

1st. The Judge erred in admitting the declarations of McKeller, def'd't's. agent. What an agent says within the scope of his authority is evidence against his principal, but any declaration of his own, and not as the instrument of his principal, is not evidence. *Saund. Pl. and Ev.* 53. 1 *Stark. on Ev.* 60. *Langhorn* v. *Alnutt*, 4 Taunt, 519.

2nd. The agent was a competent witness for defendant, unless evidence had been given of *his* negligence. In this case no evidence had been given of negligence on the part of the agent. *Stark. on Ev. part* 4, 768.

3d. The plaintiff was in fault himself, and cannot recover. *Flower* v. *Adam*, 2 Taun. 314, *Bridge* v. *Grand Junction Railway Company*, 3 M. and W. 546, *Butterfield* v. *Forrester*, 11 East. 60, *Blackwell* v. *Wilson*, 5 C. and P. 375, *Rathburn* v. *Payne*, 19 Wend. 379.

4th. The Judge erred in charging the jury, that "the testimony made out a *prima facie* case of negligence," &c. The question of negligence is for the jury. *Rice* v. *Rigby*, 4 B. and A. 202, *Smith* v. *Horne*, Holt's C. 643, *Starkie on Ev. part* 4, 973.

BATTLE, J. Upon the question, whether H. McKeller, a witness called for the defendant, was competent to testify for him under the circumstances, in which he was offered, we differ from the Judge who presided at the trial. The case states, that it was admitted that the witness was agent for the defendant, but whether he was a general or special agent, whether he was an agent only to carry the raft of timber to Wilmington or only an agent to receive it there and sell it for the benefit of his principal, is not shown. An agent, as such, is not necessarily incompetent to testify for his principal. He can be excluded only on the ground of interest. If an action be brought against his principal for an injury, sustained by reason of the agent's negligence or misconduct, then he is directly interested in the event of the suit, because he is responsible over to his principal for the amount of the damages recovered against him. 1 *Stark. on Ev.* 112, 113. Now in this case there was no evidence that the injury to the plaintiff's bridge was caused by the negligence or misconduct of the witness. It does not appear that he had charge of the raft, at the time when it was carried by the tide against the bridge. From all that is shown, the raft might then have been under the charge of the defendant himself or of another agent. The first that we hear of McKeller is the day after the injury, when he went to

the bridge for the purpose of securing the raft and carrying it to Wilmington. He then admitted his agency, but when it was assumed and what was the nature and extent of it, was not stated. It seems to us, that the facts and circumstances, making out a *prima facie* case of responsibility to his principal, should have been shown before the witness was excluded; and if such had been shown, then the defendant ought to have been permitted to examine him on his *voire dire*, to explain his real situation. 1 *Stark. on Ev.* 123.

For the improper exclusion of the testimony of the witness, McKeller, a new trial must be granted: and as the case may then assume a very different aspect from that which it now presents, it is unnecessary for us to decide the other questions presented in the record. The judgment is reversed and a new trial granted.

Per Curiam. Judgment reversed and new trial granted.

DEN ON DEMISE OF WILLIAM L. COLLAIS *vs.* REBECCA McLEOD & AL.

Where a judgment and execution from a justice were for a certain sum and costs, and, for want of goods and chattels, the execution was levied on lands, and returned, as by law directed, to the County Court, and an order for *venditioni exponas* to issue, &c. and the *venditioni exponas* directed the sheriff to levy and sell for the amount returned by the justice, and also *for interest on the justice's judgment; held* that the execution was not valid, even as to the purchaser at the execution sale.

An execution cannot require the collection of interest, when the judgment, upon which it is issued, does not give it.

Where a judgment is recovered by a sheriff, and the execution thereon is issued to him, any sale made by him under such execution is absolutely void and vests no title in the purchaser.

The cases anonymous, 2 Hay. Rep. 26, *Deloach* v. *Work*, 3 Hawks R. 36, *Dobson* v. *Murphey*, 1 Dev. and Bat. R. 586, *Ingham* v. *Kirby*, 2 Dev. and Bat. 21, and *Blanchard* v. *Blanchard*, 3 Ired. Rep. 105, cited and approved.

Appeal from the Superior Court of Law of Cumberland County, at the Spring term, 1848, his Honor Judge BAILEY presiding.

This was an action of ejectment, in which the plaintiff claimed under a judgment, execution, *venditioni exponas*, and sheriff's sale, and sheriff's deed. The judgment was for $40 20—the *venditioni exponas* for that sum *and interest*. The judgment and execution are in the name of Alexander Johnson, who was the sheriff of Cumberland; but it was proven by the sheriff (his testimony being objected to by the defendant, but allowed by the Court,) that although the judgment was in his name, it was originally, in equity, the property of the lessor of the plaintiff, except the sum of five dollars and twenty cents, and that before the sale, and even before the last *venditioni exponas* issued, the lessor of the plaintiff had pur-

chased of, and paid the said sheriff, for all his said interest, and the said sheriff from thenceforth ceased to have any other or further interest in said judgment, than he had in any other judgment upon which an execution had come to his hands.

A verdict was rendered for the plaintiff, subject to the opinion of the Court, whether there was such variance between the judgment and execution, under which the plaintiff claimed, as to vitiate the sale; and whether the sale, being made by the sheriff under the above-mentioned circumstances, was invalid, and the Court being, of the opinion upon those points, with the defendants, directed a non-suit, and the plaintiff appealed.

Strange, for the plaintiff.
W. Winslow and *McRae*, for the defendants.

Battle, J. Two objections were taken to the recovery of the lessor of the plaintiff, on the trial of this case in the Court below. The first was, that the writ of execution, under which the lot of land in question was sold, did not correspond with the judgment, and could not therefore be supported by it. From the transcript of the record, it appears that Alexander Johnson recovered a judgment bearing date the 23d day of December, 1840, against the defendant, Rebecca McLeod for the sum of forty dollars and twenty cents and costs, upon which an execution issued, which, for want of goods and chattels, was levied on the lot of land now sued for, and due return thereof was made to the then ensuing term of the County Court. At that term, the judgment of the justice was "affirmed for forty dollars and twenty cents," and costs, and an order was made, that a writ of *venditioni exponas* should isue for the sale of the land levied upon. The writ of *vendi. expo.* was issued accordingly, but in it the sheriff, was commanded to make the amount of the said judgment "with interest from the 23d day of December 1840, until

paid" and costs. It was contended that the execution did not pursue the judgment, because it ordered the collection of interest, with regard to which, the judgment and justice's execution were silent. We think that the objection is well founded. At common law, a judgment did not carry interest, when an execution, or a *scire facias* to revive it, was issued upon it. But if a new action were brought upon the judgment, then interest was allowed. *Anonymous*, 2 Hay. Rep. 26. *Deloach* v. *Work*, 3 Hawks Rep. 36. The Act of 1807 (1 Rev. St. ch. 31, sec 95,) was passed for the purpose of amending the law in this respect. It provides, that "in all actions brought to recover money due by contract, except on penal bonds," the jury shall distinguish by their verdict what is due as principal money from what is due as interest, and that judgment shall be rendered thereon that the sum due as principal money, shall carry interest until paid. Whether this applies to actions brought by warrant before a single justice, where there is no jury, or whether a fair interpretation of the "Act concerning the power and jurisdiction of Justices of the Peace," (1 Rev. Stat. ch. 62,) confers a similar power in such cases upon a single justice, it is unnecessary for us to decide. It is clear that an execution cannot require the collection of interest, when the judgment, upon which it is issued, does not give it. The writ of *vend. expo.* then, in this case varies from the judgment in this particular; and it being incumbent upon a purchaser, claiming under a sheriff's sale, to produce, besides the sheriff's deed, a judgment and an execution corresponding therewith, the title of the plaintiff's lessor is defective. *Dobson* v. *Murphey*, 1 Dev. and Bat. Rep. 586. *Ingham* v. *Kirby*, 2 Dev. and Bat. Rep. 21. *Blanchard* v. *Blanchard* 3 Ire. Rep. 105.

The second objection presents a question of more difficulty; but, after much reflection, and after consulting all the authorities bearing upon the subject, to which we have

been referred in the argument, or which we could ourselves find, we have been led to the conclusion that this is also fatal to the title of the lessor of the plaintiff. It is well established that at the common law, process should be isued to the coroner in all cases, where the sheriff is a party, either plaintiff or defendant; and that, if, in such cases, it be issued to the sheriff, it will be set aside as irregular, upon the application of the other party to the Court from which it was issued. 1 *Black. Com.* 349, 1 *Sir W. Black. Rep.* 506, 4 *Inst.* 271, *Watson on Sheriffs* 37. Our legislature evidently proceeded upon the supposition, that such was the law, in passing the Acts of 1779 and 1821, (1 Rev. St. c. 25, s. 7, and c. 31, s. 59,) which provide for the execution of process in all cases, where there is no proper officer in any county, to whom it can, or ought to be directed. *Anonymous*, 1 Hay. Rep. 423. But admitting that such is the law, and that, upon the application of the defendant in this case, the writ of *vend. expo.* would have been set aside, it has been contended before us, that the sale made by the sheriff was valid, and that the plaintiff's lessor acquired a good title by his purchase. We think that upon principle it ought not to be so, and upon authority, it is not so. Self-interest is so strong a principle of action, and its tendency to pervert the judgment, and improperly to control the conduct of all men, is so direct, so constant, and often-times so over-powering, that the law absolutely and totally prohibits a party to a suit from being a judge in his own case; and, with a few exceptions, founded upon special reasons, he is equally prohibited from being a witness for himself. The danger of being drawn aside from the line of propriety, where the execution of process, whether mesne or final, is committed to a party, is nearly, if not equally, great. The law then should equally exclude him from acting in such a case; and this can be most effectually accomplished by holding the process, and every thing done under it, null and void. We accordingly find, that

though there are some ancient cases to the contrary, it was adjudged in the 37th of Eliz. in *Candish's case*, (cited in a note to *Sir Ralph Rowlett's case*, Dyer 188, pla. 8,) that if a sheriff has a statute extended, and a *liberate* is directed to him, it is void. See also to the same effect, *Elston* v. *Britt*, Moore's Rep. 547, and *Viner's Abr. Tit. Sheriff, Letter, p. sec.* 5.

We have been unable to find any case in the modern English reports, bearing directly upon this question; and our search among the reports of the United States, and of the several States has been almost equally fruitless. The reason doubtless is, that such cases are of very rare occurrence. We have however found a case in the Kentucky reports, where it was decided that a deputy sheriff could not legally execute a *fieri facias*, which issued in his own name and for his own benefit; and that his levy under it upon a personal chattel was void. *Chambers* v. *Thomas*, 1 Littell's Rep. 268. The assignment of all his interest in the judgment by the sheriff, before he sold the land in question, makes no difference. He still continued the legal owner of it; and his sale under the execution in his own name was therefore null and the purchaser acquired no title. *May* v. *Walters*, 2 McCord's Rep. 470.

Per Curiam. Judgment affirmed.

THE STATE *vs.* JOHN CLARK.

In an indictment for larceny, the goods, alleged to be stolen, may be described by the names, by which they are known in trade, and the same principle extends to articles known by particular names, in all the arts, pursuits and employments of life.

Where a man was indicted for stealing a "bull tongue," and it appeared in evidence that he had stolen a particular kind of plough share, usually known in the neighborhood, in which he resided, by that name, *held* that the allegation of the indictment was well supported by the evidence.

The case of the *State* v. *Godet*, 7 Ired. Rep. 210, cited and approved.

Appeal from the Superior Court of Law of Randolph County, at the Spring Term, 1848, his Honor Judge PEARSON presiding.

The defendant was tried at Randolph, on the last Spring circuit, before his Honor Judge PEARSON, on the following bill of indictment:

"STATE OF NORTH CAROLINA, } Superior Court of Law,
Randolph County. } Spring Term, A. D. 1848.

The Jurors for the State upon their oath present that John Clark, late of said county, on the first day of May now last past, with force and arms in the county aforesaid, one bull tongue of the value of six-pence, and one piece of iron, of the value of six-pence, of the goods and chattels of one Thomas Winslow, then and there being found, feloniously did steal, take and carry away against the peace and dignity of the State."

The testimony on the part of the State proved that the defendant had stolen a plough share belonging to the prosecutor; that the plough share in question was a long piece of iron, sharpened at the point and widened and

flattened in the middle, so as to be in the shape of the tongue of a bull, and that it was usually called a "bull tongue," though it was sometimes also called a gopher.

Upon this testimony, the defendant's counsel moved the Court to instruct the jury, that the allegation of the article stolen, being a piece of iron, was not supported by the evidence; and that the allegation of its being "one bull tongue" was too vague and indefinite, to justify a conviction, for the reason that "bull tongue," as applied to a species of plough share, was a mere local term. His Honor instructed the jury as requested, upon the first point, saying that although the article stolen "was made of iron, yet when it was shaped and formed into a distinct article, such as a ring, or clevis, or plough share, it was no longer a mere piece of iron." Upon the second point, he charged, "that if the jury believed from the evidence, that the defendant had stolen a plough share, which was usually called a bull tongue, the charge in the indictment was sufficiently specific to justify a verdict." The jury found the defendant guilty, when he moved for a new trial, which was refused. He then moved in arrest of judgment, which was also refused and judgment being pronounced, he appealed.

Attorney General, for the State.

No counsel for the defendant.

BATTLE, J. In an indictment for larceny, the article, charged to be stolen, must be properly and sufficiently described, so that there may be no doubt of its identity. This is required for the purpose of enabling the Court to see that the article is of value; and also for the protection of the accused, by informing him of the distinct charge against him, and furnishing him with the means of showing, if subsequently indicted for the same offence, that he has already been convicted or acquitted of its

commission. *State* v. *Godet*, 7 Ired. Rep. 210. And the evidence must correspond with the description of the property laid. *Ibid.* Many nice questions have been raised on this subject, and some of the cases have turned upon distinctions savouring of almost too much refinement. See the note to the case of the *King* v. *Halloway*, 1 Carr. and Payne 127, (11 Eng. C. L. Rep. 341.) Goods may be described by the name by which they are known in trade. *King* v. *Nibbs*, R. and Ryan 25, Arch. Crim. Pl. 170. The same principle must extend to articles known and used in all the arts, pursuits, and employments of life. In the note to the case of *King* v. *Halloway*, above referred to, the reporter, after stating that it is particularly necessary to be precise in an indictment, with regard to the description of stolen property, says that it is best, at least in one count, to call the thing by the name, by which the witnesses will call it in their testimony. This is certainly in furtherance of the main purposes for which a definite description is necessary, that is, to inform the accused of the precise charge against him, and to enable him to defend himself against a subsequent indictment for the same offence.

In the case before us, it would have been better undoubtedly to have described the stolen article, as one plough share, commonly called and known by the name of a bull tongue. But we think, that the appellation simply of "bull tongue" is sufficient. A certain species of plough share, made in the shape of the tongue of a bull, was, as the witnesses stated, *usually* called a bull tongue, and though it appeared that it was *sometimes* called by another name, yet the defendant could hardly have been mistaken as to the article, with the stealing of which he stood charged.

The counsel indeed objected that the name applied was a mere local one, but it does not appear that the name of the article stolen is less extensive than its use. We think therefore, that there was no error in the charge

of the Court upon this point, which is the only one necessary for us to decide.

The reasons for the motion in arrest of the judgment, are not stated, and as we see none, it must be so certified to the Superior Court.

PER CURIAM. This opinion ordered to be certified to the Court below.

THE STATE *vs.* MORDECAI LAMB.

Upon an indictment under the Act relating to fences, (1st Rev. St. ch. 48,) it is the province of the Court, where the jury have ascertained the facts, to pronounce whether those facts shew that the fence was such a one, as is required by the statute, or whether the navigable stream, water course, &c., was sufficient in lieu of the fence.

Appeal from the Superior Court of Law of Randolph County, at the Spring Term, 1848, his Honor Judge PEARSON presiding.

The defendant was tried at Randolph Superior Court on the Spring Circuit of 1848, before his Honour Judge PEARSON, for failing to make, and keep up during crop time, a sufficient fence about his cleared ground under cul-

tivation, "there being no navigable stream or deep water course that might be deemed sufficient instead of a fence."

From the testimony, given on the trial, it appeared, that the defendant was the owner of a field, lying in Randolph County on Deep River, and cultivating a crop of corn in it, during the time mentioned in the indictment. The field was surrounded on three sides by a sufficient fence, but on the fourth side, bounding on the river, it had no fence. The lands on the opposite side of the river belonged to different persons, and were in woods and unenclosed. The river is an unnavigable stream, full of rocks and shoals. Just below the defendant's field, there was a mill dam, which had been kept up for many years, the effect of which was to form a pond in the channel of the stream, which was generally about five feet deep, and from twenty-five to fifty yards wide. It appeared futher, that other persons, besides the defendant, had fields along the pond, some of whom had fences on the side next to it, while the rest had none; and that, for several years before this indictment was found, the hogs belonging to the neighbouring planters were in the habit, during the crop season, of swimming across the pond and getting into the unenclosed fields lying on it, and doing much damage to the growing crops, and being themselves much injured by dogs. It was proved, however, that, for the last two or three years, the only hogs, which crossed the pond into the defendant's field, belonged to the prosecutor, and that horses and cattle were never known to cross the pond at all.

The counsel for the defendant contended, that, whether the pond, which bounded on one side of the defendant's field was to be deemed a deep water course, and sufficient instead of a fence, within the meaning of the Act, upon which the indictment was framed, was a question of fact for the decision of the jury; but that, if it were not a question of fact for the jury, then, as a question of law, it must be deemed sufficient.

His Honor was of opinion, and so charged the jury, that the sufficiency of the pond to answer, as a deep water course, instead of a fence, was a question of law, and that the testimony in the cause, if believed to be true, showed that the pond was not sufficient for that purpose. The jury, under the charge of the Court, found the defendant guilty, and from the judgment pronounced upon the verdict, he appealed.

Attorney General, for the plaintiff.
No counsel for the defendant.

Battle, J. We think that there can be no doubt of the correctness of the opinion expressed by his Honor. The Act "concerning fences" (1 Rev. St. c. 48,) requires, "that every planter shall make a sufficient fence about his cleared ground under cultivation, at least five feet high, unless where there shall be some navigable stream, or deep water course, that may be deemed sufficient instead of a fence as aforesaid; and the 42d section of the Act "concerning crimes and punishments," (1 Rev. Stat. c. 34,) makes every person indictable for neglecting to keep and repair his or her fence during crop time, in the manner required by the Act concerning fences. What is a sufficient fence, and what kind of navigable stream, or deep water course is to be deemed sufficient instead of a fence, within the Act, must be questions of law, because the interpretation of statutes, and the ascertaining of the meaning of all the terms employed in them are confided to the Courts. This duty they discharge by pronouncing what is the true construction of a whole statute, or the sense of any particular section, phrase or word, contained in it, upon the facts found by the jury in any case arising under it. His Honor, then, did right in assuming to decide upon the sufficiency of the pond to answer, as a deep water course, instead of a fence. The enquiry remains, was the question of sufficiency

rightly decided. We think it was. It is manifest from a view of all the provisions of the Act, which we are discussing, taken together, that its purpose is to prevent horses, mules, and other stock, not more than ordinarily addicted to mischief, from breaking into fields under cultivation, and damaging the crops, which may be growing in them, and also to protect such stock from being killed, maimed, or otherwise injured by the owners of the fields. To accomplish this purpose, a sufficient fence, at least five feet high, unless there be some navigable stream or deep water course that will answer instead of such fence, is required. The object is to keep out horses, hogs, and other stock. Can any fence, stream, or water course, be deemed sufficient, that will not, under ordinary circumstances, secure the accomplishment of this object? Surely not. Otherwise the Court must be guilty of the absurdity of pronouncing that to be *sufficient in law* which proved to be *insufficient in fact.*

It must be certified to the Superior Court, that there is no error in the judgment appealed from.

PER CURIAM. Ordered to be certified accordingly.

JOHN SMITH & AL. vs. MALCOLM SHAW.

Where a writ is brought in the name of A. B. & Co. and it is afterwards amended so as to substitute in place of A. B. & Co. the names of A. B., C. D., and E. F. composing the firm of A. B. & Co., it *seems* this will operate as a discharge of the bail.

Where a *scire facias* against bail does not set forth how the defendant became bound as bail, nor recite the cause of action, nor the court in which the judgment against the principal was obtained, it is fatally defective.

The case of *Bryan* v. *Bradley*, 1 Tay. 77, cited and approved.

Appeal from the Superior Court of Law of Anson County, at the Fall Term, 1846, his Honor Judge SETTLE presiding.

This was a *scire facias* against the defendant as the bail of one Laurence Moore. It commenced in the County Court and recited that "whereas it appears that at April term 1845, a judgment was obtained by John Smith, Joseph P. Smith and William G. Smith, trading and acting under the name and style of John Smith & Co. against Laurence Moore for the sum of ninety-three dollars and forty-four cents principal money, and twenty-four dollars interest, also ten dollars and seventy-five cents for costs, that accrued therein, and that Malcolm Shaw was bound as bail for the appearance of Laurence Moore. And the said judgment being in full force, not satisfied, you are hereby commanded to make known to Malcolm Shaw his liability in the premises, that he may appear, &c." The defendant appeared and pleaded, *nul tiel* record, a release and discharge of bail; and upon his motion the *scire facias* was quashed: whereupon the plaintiff appealed to the Superior Court. And in that Court the plaintiffs were permitted to demur to the plea

of discharge of bail, "for the reason that the plea did not state in what manner the bail was discharged, whether by death, surrender of principal, or otherwise." Afterwards the cause coming on to be tried, at the Fall Term, 1846, of the Superior Court of Law for Anson County, it appeared in evidence that John Smith & Co. sued out their writ against Laurence Moore, returnable to January Term, 1845, of Anson County Court. The writ was issued in the name of "John Smith & Co." and commanded the arrest of Moore to answer them of a plea of trespass on the case: and under it he was arrested and gave the defendant Malcolm Shaw as bail. At the ensuing April term of the said Court, the plaintiffs obtained leave to amend, and did amend, this writ so as to make it run in the names of John Smith, Joseph P. Smith, and William G. Smith, trading and acting under the name and style of John Smith & Co. and in that name they obtained a judgment against the said Moore. Under the charge of the Court the jury found that there was no release, and the Court adjudged that there was such a record, that the demurrer to the plea of discharge of bail be sustained; and a judgment was given against the defendant according to the *scire facias*, from which he appealed to the Supreme Court.

Winston, for the plaintiffs.

No counsel appeared in this Court for the defendant.

BATTLE, J. The *scire facias* and the pleadings thereupon in this case are so imperfect and defective, that the question relative to the discharge of the bail by reason of the amendment of the plaintiffs writ, which was intended to be presented in the Court below, and which has been mainly discussed in the argument here, cannot arise. There is no allegation in the *scire facias* of the bond by

which the defendant, Shaw, became bound as the bail of Moore. It was merely recited, that he "was bound as the bail for the appearance of Laurence Moore," without stating that it was by bond, or that it was according to the provisions of the Act of the General Assembly, "concerning bail in civil cases." The defendant then had no opportunity of putting in any plea, by which the question of his discharge, on account of the alteration of the writ, could be presented. Had such an opportunity been offered him, his proper plea would have been that of *non est factum:* for, upon the trial of the issue arising upon that plea, the question could have been distinctly presented, whether a bail bond given in a suit brought in the name of John Smith & Co. could sustain a declaration upon the *scire facias*, reciting a bond executed in a suit brought and prosecuted to judgment by John Smith, Joseph P. Smith and William G. Smith, trading and acting under the name and style of John Smith & Co. And this, we think, must have been decided against the plaintiffs. *Bryan* v. *Bradley*, 1 Tayl. Rep. 77, *Levett* v. *Kibblewhite*, 6 Taun. Rep. 483, (1 Eng. C. L. Re. 459) *Tidd's Practice* 294, 450, *Petersdorff on Bail* 417. But as the point does not arise, we do not decide the case upon it.

Upon an inspection of the record brought before us by the appeal of the defendant, it appears that judgment was rendered against him according to the *scire facias* for $117 44, of which sum $73 44 is principal money. That judgment cannot be sustained. The *scire facias* (and of course the declaration which must conform to it) is fatally defective, both in form and substance. Besides not setting forth how the defendant became bound as the bail of Moore, it does not recite the cause of action, nor even the Court, in which the judgment against the said Moore was obtained. These are certainly essential statements; and for the want of them the judgment must be arrested. The judgment rendered against the

defendant in the Superior Court is therefore reversed, and judgment in this Court is arrested.

PER CURIAM. Judgment arrested.

OLIVER WYLIE, CHAIRMAN, &c. *vs* JESSE SMITHERMAN, ADM'R. &c.

The presumption is that a person, who is entitled to a deed, has it in his possession, until the contrary be shown; and the contrary may be shewn by the affidavit of the person so entitled.

In actions of trespass for the destruction of property, the proper measure of damages is the value of the property destroyed, unless the trespass is committed wantonly or maliciously, when the jury may, if they think proper, give vindictive damages, but that is a matter for them to decide and not for the Court.

The case of *Harper* v. *Hancock*, 6 Ire. 124, cited and approved.

Appeal from the Superior Court of Law of Richmond County, at the Spring term, 1848, his Honor Judge BAILEY presiding.

This was an action of trespass *vi et armis quare clausum fregit*, brought by the plaintiff, as the Chairman of the County Court of Montgomery, to recover damages

for the burning of the Court House of that County by the defendant's intestate. Pleas, the general issue, *liberum tenementum*, and licence.

Upon the trial, it was proved that the Court House of Montgomery County was burnt on the 31st day of March, 1843, between the hours of 9 and 12 o'clock at night, and testimony was then given tending to show that the act was done, or was procured to be done, by the defendant's intestate. The plaintiff then introduced a properly certified copy of a private act of the General Assembly, passed in the year 1815, for the purpose of removing the Court House and other public buildings from the town of Henderson to some more suitable place. To that end certain persons were appointed Commissioners with authority to them, or a majority of them, to purchase fifty acres of land at the place, which they might select, and they were then directed to lay off the land, so purchased, into town lots and make sale of them at public auction, retaining two acres for the use of the County, upon which it was made their duty to have a Court House and other necessary public buildings erected: and they, or a majority of them, were further directed to make title in fee simple to the purchasers of the lots: and to execute a conveyance to the Chairman of the County Court and his successors forever for the two acres reserved for the use of the public. Mr. Deberry was then called as a witness for the plaintiff and testified, that he was one of the commissioners appointed in the act aforesaid, that the duties therein enjoined were performed, among which was that of causing to be erected the Court House for the burning of which this action was brought, and that the commissioners then executed a deed for the land, upon which it was built, to Joseph Parsons, who was then the acting Chairman of the County Court. He testified further, that this deed was duly proved and registered, and then delivered to John B. Martin, the then Clerk of the County Court, to be filed among the records of his office, but whether Jo-

seph Parsons knew of the deed or not, the witness could not tell. He stated that it was proved in the year 1817, but at what term of the Court in that year he could not recollect. Another witness testified, that he succeeded Mr. Martin as Clerk of the County Court, and that in the year 1839 or 1840, he saw a paper in the office endorsed "A deed from Davidson and others, commissioners, to Joseph Parsons, Chairman," and he thought that he had read it, but he could not state its contents. The plaintiff then proposed to prove by Mr. Deberry the contents of the said deed, but the testimony was objected to, on the ground that the loss of it had not been sufficiently accounted for, the presumption being that it was in the possession of Joseph Parsons or of the present plaintiff; and further that there was no affidavit by the plaintiff of its loss or destruction. The objection was over-ruled and the testimony received. It was then proved that the present plaintiff was appointed Chairman of the County Court in 1841, and a record made of it, but this record, together with all the other records of the office, was destroyed in the conflagration of the Court House. A witness called for that purpose testified, that the Court House could not have been re built for less than one thousand dollars, though it would not have sold for more than two hundred dollars. Much more testimony was given, and several objections raised, which it is unnecessary to state, as they are not adverted to in the opinion of this Court.

The defendant's counsel contended, that the plaintiff could not recover at all, but if he could, the utmost extent of his damages would be two hundred dollars. The Court charged the jury, that, if they found a verdict for the plaintiff "the measure of his damage was not that for which Court House would have sold, but the amount it would have taken to re-build such a Court House at that place as was destroyed." The jury returned a verdict for the plaintiff, assessing his damages to twelve

hundred and fifty dollars. A motion for a new trial was made and over-ruled, and from the judgment given against him, the defendant appealed.

Strange, for the plaintiff.
Mendenhall and *Iredell*, for the defendant.

BATTLE, J. The objection to the testimony of the witness, who was offered to prove the contents of the deed from the commissioners to Joseph Parsons, was well founded and ought to have been sustained. The deed may possibly have been, and probably was, among the records of the County Court, and was destroyed by the fire, which consumed the Court House. Such however was not distinctly and sufficiently proved, and as the presumption was, that the person, who was entitled to the deed, had it in his possession, he ought to have rebutted the presumption by proving that such was not the fact, which he was at liberty to have done by his own affidavit. In the case of *Harper* v. *Hancock*, 5 Ire. 124, the rule is so laid down, and the reasons, upon which it is founded, are fully stated. Nor is this affected by the act of 1846, ch. 68: for that only makes a registered copy of a deed evidence, without requiring the party, who is entitled to the original, to account for its non-production, but contains no provisions for proving the contents of the original deed by parol testimony. The charge of the court upon the question of damages was also erroneous. The proper measure in actions of this kind is the real value of the property destroyed, unless the trespass is committed wantonly or maliciously, when the jury may, if they think proper, give vindictive damages. *Duncan* v. *Stalcup*, 1 Dev. & Bat. Rep. 440. It may be that this was a proper case for such damages, but whether they should have been given or not, was a question which ought

to have been submitted with proper instructions to the jury.

The judgment of the Superior Court must be reversed and a new trial granted.

PER CURIAM. Judgment reversed.

WILLIAM HALCOMBE *vs.* JOHN A. ROWLAND.

A sheriff may be amerced for not returning process at a term subsequent to that, to which the return should have been made.

Appeal from the Superior Court of Law of Surry County, at the Fall Term, 1847, his Honor Judge PEARSON presiding.

This is a *sci. fa.* against the defendant, who was the sheriff of Robeson County, to recover of him the sum of $100, for not returning a writ of *capias ad respondendum.* The case is as follows: A writ was duly issued from the office of the Clerk of the Superior Court of Surry, returnable to the Spring Term, 1846, and came to the hands of the defendant, who was then the sheriff of Robeson County, to whom it was directed, more than twenty days before the return term. The defendant failed to return it according to law, and, at the Fall term

following, a judgment *nisi* was entered up against him for $100, and this *sci. fa.* issued. The defendant objected, that the Court had no power, to fine a sheriff at one Court for a default at a former one. This objection was over-ruled by the Court, and judgment being rendered for the plaintiff the defendant appealed.

Boyden, for the plaintiff.
Strange, for the defendant.

NASH, J. There is nothing in the objection. The proceedings are instituted under the 61st section of the Revised Statutes. It is provided "that any sheriff and coroner, who shall fail duly to execute and return all process to him directed, shall be subject to a penalty of $100 for each neglect, to be paid to the party aggrieved, by order of the Court, upon motion and proof that the process was deliverd to him twenty days before the sitting of the Court, to which it was returnable, unless the sheriff or coroner can show sufficient cause to the Court for his failure, at the Court next succeeding *such order*." The act does not require that the judgment for the penalty, shall be rendered at the term to which the writ is returnable, nor can any good reason be assigned, why it should. The judgment is a conditional one, to be enforced only on the failure of the officer, at the term succeeding, to show a sufficient reason for his delinquency. Being granted on motion without personal service of any notice of the intention to make it, it is final to no purpose, except, perhaps, that of the failure to return, but leaves, by the express provision of the Act, to the officer the privilege of showing any "sufficient cause for his failure," provided he applies to be heard at the proper time, to-wit, the term succeeding the making of the *order for the amercement*, and that is the object of the *sci. fa.* Its language is, "then and there to shew cause, if any he has, why

the said plaintiff, William Halcombe, shall not have execution thereof, &c." Upon the return of the *sci. fa.* a full defence is open to the sheriff; he may show that the writ never came to his hands, or that he did not receive it until after the return day, or that by some inevitable accident he was prevented from making his return, or in the language of the Act, any sufficient reason. If the sheriff be actually present in Court, when the motion to amerce is made, the Court would no doubt then hear his excuse, but his defence is not, fortunately for him, (in this particular,) confined to that time. The Act not only gives to the party injured the sum of $100 for each failure, but likewise subjects the delinquent officer to an indictment. With equal propriety it might be argued that the prosecution must be commenced at the return term of the writ.

We see no reason to disturb the judgment.

PER CURIAM. Judgment affirmed.

WILLIAM MITCHELL *vs.* MOSES WALKER.

The action of assumpsit is a liberal action, and where, by the obligations of justice and equity, the defendant ought to refund money paid to him, the action will be sustained; but where he may, with a good conscience, receive the money, and there was no fraud or unfair practice used in obtaining it, though it was money he could not have recovered by law, it cannot be recovered back.

The jurisdiction of a single justice extends to all cases for the recovery of money, when the amount is within the sum designated in the Act of the General Assembly, when a general indebitatus will lie, whether the contract is expressed, or implied by law.

The cases of *Pool* v. *Allen*, 7 Ired. 120, and *Ferrell* v. *Underwood*, 2 Dev. 111, cited and approved.

Appeal from the Superior Court of Law of Person County, at the Spring Term, 1848, his Honor Judge PEARSON presiding.

The case is as follows: In 1835, the plaintiff hired from one Brooks a negro, for the sum of $16, and gave his note with the defendant as his surety for its payment. The plaintiff was the agent of one Shelton, for whose use the negro was hired. Of this fact the defendant was ignorant, at the time the note was given, and, upon learning the truth, insisted that Brooks should give up the note to him, which was done upon Shelton assuming to pay the debt. Soon after Shelton did pay the money to Brooks. The defendant kept the note in his possession nine years, when he sent it for collection to an officer in the State of Virginia, where the plaintiff lived. The latter, upon being apprised of the fact, went to see the defendant, and told him he had expected Shelton would have paid off the note. Defendant assured him Shelton had not so done, but that he had been compelled to pay

it, and looked to him for the amount. Upon this representation the plaintiff paid the amount claimed to the defendant, who undertook to collect it from Shelton and pay it over to the plaintiff.

To recover the amount so paid by the plaintiff to the defendant, this action was brought by a warrant before a single magistrate.

The defendant moved the Court to charge the jury, that, as the payment by the plaintiff was a voluntary one, he could not recover it back; but if he could, it could not be done by warrant. This instruction the presiding Judge refused to give, but charged the jury, that, although the money was paid by the plaintiff, when under no legal coercion so to do, ye tif he acted under a mistake of facts, falsely represented by the defendant, he had a right to recover it back, and in this form of action.

Under the charge of the Judge, the jury found a verdict for the plaintiff, and judgment being rendered thereon, the defendant appealed.

E. G. Reade and *T. B. Venable*, for the plaintiff relied upon the following authorities:

The form of action is properly, assumpsit. *Nilney* v. *Duncan*, 13 Eng. C. L. 293.

Action of assumpsit properly brought before a single magistrate. *Terrill* v. *Underwood*, 2 Dev. 111.

Kerr, for the defendant.

Nash, J. To the plaintiff's recovery two objections are urged; first, that the payment by him to the defendant was voluntary; and, secondly, if he could recover, a single magistrate had not jurisdiction. The action for money had and received rests upon equitable principles, and whenever there is a privity between the payer and

receiver, and the latter has received money to which the former is in justice and equity entitled, the law implies a promise to pay it, and gives this action. *2 Stark. on Ev.* 63. It is true that in one sense the payment by the plaintiff was voluntary. He did not pay it under duress of his person, nor did he pay it under process of law, but was it voluntary in that sense, which, in law, disqualifies him to demand it back? In order to have this effect, the payment must be made, with full knowledge of the facts, or full means of obtaining that knowledge. *Waite* v. *Legget*, 6 Con. 195. *Clarke* v. *Dutcher*, 9 Con. 674. And when the money has been paid, not with this full knowledge and it is shown to have been unjustly paid, it may be recovered back. *Chatfield* v. *Paxton*, 2 East. 471. *Pool* v. *Allen*, 7 Ire. 120. In the case before us, it is not pretended, that the plaintiff knew the facts; on the contrary, he had the best reason to believe that the statement of the defendant was true. He was the surety to the note; the plaintiff lived in Virginia, and the defendant was the only person, in this State, who, upon the face of the note was liable to its payment, and who, upon discharging it, was entitled to its possession. The possession of the note therefore, by defendant, nine years after it fell due, was to the plaintiff evidence that he had paid it. It is true, that by applying to Shelton or to Brooks, the payee of the note, he might have ascertained the truth of the transaction. But the fraud, perpetrated by the defendant, superseded the necessity of so doing, and deprived the defendant of that defence. By his own falsehood he put the plaintiff asleep and threw him off his guard, and now asks to be protected in his fraud. The action of assumpsit is a liberal action, and where, by the obligations of justice and equity, the defendant ought to refund money paid to him, the action will be sustained; but where he may, with a good conscience receive the money, and there was no fraud or unfair

practice used in obtaining it, although it was money he could not have received by law, it cannot be recovered back. 4 John. Rep. 249 in note to *Hall* v. *Schulty*. The case of *Myher* and *Duncan*, 13 E. C. L. Rep. 293, cited at the bar is a strong authority upon the point we are considering. A bill of exchange had come by endorsement to the defendant, Duncan, who by his negligence in not presenting it for payment, in proper time, had made it his own. Afterwards discovering, as he honestly thought, that the bill was void, for being drawn on an improper stamp, he demanded from the plaintiff, from whom he had received it, the amount due. The case states that both the plaintiff and defendant were ignorant of the fact, that the bill was an Irish bill and did not need an English stamp. The plaintiff paid the defendant the amount due upon the bill, and upon discovering that it was an Irish bill, brought the action of assumpsit against the defendant for money had and received to his use.

LITTLEDALE, Justice, in giving his opinion states, that the plaintiff "had means of knowing that the bill was drawn in Ireland, for he might have enquired of the prior endorser, but there being nothing on the face of the bill, to lead him to suppose that it was drawn in Ireland, he was not bound to make any enquiry;" and the *postea* was delivered to the plaintiff. In the present case, not only had the defendant full knowledge of all the facts, but the plaintiff was ignorant of them, and his ignorance was founded upon the unequivocal and positive falsehood of the defendant.

But it is further objected by the defendant, that if an action can be sustained upon such a transaction, a warrant cannot be sustained. The case of *Ferrell* v. *Underwood*, 2 Dev. 111, is a full answer. The jurisdiction of a single Justice extends to all cases, for the recovery of money, when the amount is within the sum, designated in the Act of the General Assembly, when a general

indebitatus will lie, whether the contract is expressed, or implied by law.

PER CURIAM. Judgment affirmed.

LEWELLEN BOWERS & AL. vs. SALLY A. BOWERS.

Where on a petition for dower int he County or Superior Court, the jury have made a report and that report is confirmed, the heirs cannot, at a subsequent term, file a petition to set aside this allotment of dower.

If there be errors in the allotment, the redress, if any, is not by petition.

Appeal from the Superior Court of Law of Martin County, at the Spring Term, 1848, his Honor Judge CALDWELL presiding.

The defendant, the widow of James L. Bowers filed her petition in the County Court of Martin at January term, 1847, for the purpose of having allotted to her her dower in the lands, of which her husband died seized and possessed. Such proceedings were had in the case, that, at the April term, 1847, the jury of freeholders, who had been previously summoned by the sheriff, in obedience to an order of the Court, made their report, assigning to the widow her dower in the lands set forth in the petition, and the report was at the same term confirmed and the sheriff duly put her in possession.

This petition was filed at October term, 1847, of the Court of Pleas and Quarter Sessions, and prays that for the errors set forth therein, the Court will "set aside the report of the said sheriff and jury, and order a re-allotment and assessment of the said lands."

The Court below dismissed the petition, because the objections to the confirmation of the report of the jury ought to have been made at the Court to which the said report was returned and confirmed, and upon the further ground, that, if there was a remedy to correct an improper allotment of dower, after the term of the Court, at which the report was made and confirmed, the proceeding in question was not the proper one. The plaintiff appealed.

Biggs, for the plaintiff.
P. H. Winston, Jun., for the defendant.

NASH, J. The relief *so* sought cannot be granted. Although the original proceedings commenced by petition, yet they are on the common law side of the Court, and any error, which may have been committed by the Court, cannot be corrected by petition.

It is unnecessary to look into the various modes of assigning dower at common law. The proceedings in this State are under our own statute, Rev. Stat. c. 121, s. 2, which gives to our common law Courts, either County or Superior, jurisdiction of the subject. Its object was to secure to the widow a shorter and more simple mode of asserting her claim. Wherever the law has given to a party a right to go into a Court of law, to ascertain by petition a mere equitable right, there, as the proceedings are such as are in use in equity, they must be governed by the rules of chancery practice. If, therefore, in a petition for a distributive share, a witness be summoned by either party, he must be paid by the party summoning

him, because that is the rule and practice in chancery. *Ryder* v. *Jones*, 3 Hawk. 24. So a decree made in such a case may be re-heard on petition. *This* however, is a case entirely at law, and is to be governed by the rules and practice of a Court of law.

It is said, however, that this petition, may be regarded as a writ of error, and that the Court will so regard it, to save delay and expense. There are two answers to this proposition, the first is, that it does not purport to be a writ of error, having none of its features; and in the second place, the errors complained of, if they exist, are errors of law, and a County Court cannot issue a writ to correct such errors in its own judgment. By the 17th sec. of the 4th ch. Rev. Stat. power is given to the Superior Courts to grant writs of error, for correcting the errors of law of inferior Courts. We do not give any opinion, as to whether there were any errors in the allotment of dower, complained of, but agree with his Honor, who tried the cause, that, if there were errors, this is not the mode in which they can be reached.

PER CURIAM. Judgment affirmed.

THE COMMISSIONERS OF WILMINGTON *vs* H. A. ROBY.

For the purposes of local police, the charter of a town may constitutionally authorise the inhabitants to tax themselves, or to do so through persons chosen by them.

The charter of the town of Wilmington, authorising the Commissioners to tax transient traders, for purposes of police, is not unconstitutional.

But the tax for that purpose, authorized by the Act of 1811, ch. 64, must be laid annually.

By coming within a town and acting there, a person becomes liable as an inhabitant and member of the corporation.

The cases of *The Commissioners of Plymouth* v. *Pettijohn*, 4 Dev. 591, and *Whitfield* v. *Longest*, 6 Ired. 268, cited and approved.

Appeal from the Superior Court of Law of New Hanover County, at the Special Term in January 1848, his Honor Judge MANLY presiding.

This suit was commenced by warrant on the 14th of February, 1846, to recover the sum of $25 for a town tax, claimed from the defendant as a transient person keeping a shop in the town of Wilmington.

A Private Act, passed in 1784, provided for the election of Commissioners of the town, and incorporated them and their successors, with the usual powers of appointing the necessary town officers, making ordinances and regulating the police of the town. It enacted that the Commissioners "shall annually lay a tax not exceeding ten shillings on every £100 value of taxable property in the town, and also a poll tax," &c. to be collected and by the Commissioners applied to various enumerated public purposes in the town.

By an Act of 1806, it was, among other things enacted, that the Commissioners of Wilmington, if they deem the same necessary, may have power annually to lay a tax not exceeding £10 on each transient trader or shop-keeper, who

shall retail goods in the town; with a proviso, that no person shall be deemed such transient trader, who shall be returned on the list of taxables for New Hanover County, or who will make oath, when the tax is demanded, that he has come into the town for the purpose of carrying on a permanent trade therein.

In 1811 a third Act was passed, enacting that the Commissioners may enlist a guard and night watch, "and that, for the purpose of enabling the Commissioners to support such guard, they are hereby empowered to lay an additional tax," as follows: on each horse kept within the town, not exceeding fifty cents; on each four wheeled carriage, not exceeding $2; on all two wheeled carriages for hire, or pleasure, not exceeding $1; on all drays and carts employed for hire, not exceeding $2; and on all transient persons keeping stores or shops in the said town, $25.

The plaintiffs further gave evidence, that a town guard was kept up, and that on the 2d of January, 1844, seven persons who were chosen Commissioners for the year 1844, qualified, and then passed the following ordinance:—

"Resolved, and it is hereby ordered that a tax of $25 be laid on all transient persons keeping stores or shops in the town of Wilmington, according to an Act of Assembly of 1811."

The plaintiffs further gave evidence, that early in January 1846, the defendant came with a stock of merchandise from Virginia to Wilmington for the purpose, as he then said, of temporarily selling the goods there: and that he remained there, as a trader, and retailed the goods for five or six weeks and then went away; and that during that time the treasurer of the town demanded from him the sum of $25 for a tax, and the defendant refused to pay it.

On the trial the counsel for the defendant objected to a recovery on several grounds: of which it is necessary to notice only two, as the opinion of the Court is confined to them. They are, first, that the Legislature could not constitutionally authorise the Commissioners to lay this tax; and secondly, that no tax was imposed for the year 1846. The presiding Judge ruled those points, as well as the others, against the defendant; and from a verdict and judgment accordingly, he appealed.

No counsel for the plaintiffs.

Strange, for the defendant, argued:

1. The remedy is misconceived supposing the right to exist, for

First. It is a tax, and like all other taxes collected only by distress, as is fully shewn by the provisions in relation to other taxes in the same body of Acts. Act of 1784, ch. 49, sec. 2. 1806, ch. 37, sec. 4. 1834, ch. 5.

Second. But at any rate there is no remedy by warrant, unless some special law be shewn for it, as it comes within the general law giving jurisdiction to a Justice of the Peace. *Rev. Stat. ch.* 62, *sec.* 6.

2. There was no sufficient evidence before the Court of the Private Acts. See *Rev Stat. ch.* 44, *sec.* 4 and 5.

3. That any ordinance had been passed conformably to the Act not proved, for the Books of the Commissioners are not evidence of their proceedings. 1 *Stark. Ev.* 292.

Second. If they were, then this particular ordinance was not authenticated.

4. Act unconstitutional. *Con. U. S. art.* 4, *s.* 2, *cla.* 1.

5. Ordinance does not specify the only purpose for which the Commissioners were authorized to lay the tax.

6. The Commissioners are only authorized by the Act to lay an annual tax. Now the terms of this act of the Commissioners in 1844 are general, and either the Commis-

sioners have exceeded their authority in laying a tax for more than one year, or no tax is laid for 1846.

7. The warrant does not properly set forth how the claim is due. *Rev. St. ch.* 62, *sec.* 21. It makes no reference to the ordinance. *Hamilton* v. *Jervis*, 2 Dev. and Bat. 227. *Duffy v. Averitt*, 5 Ire. 455.

8. Warrant technically defective. 1st. In not setting forth the statute. 2dly. In not setting forth the bye law. *Wilc. on Municipal Corporations*, page (marginal) 172, sec. 423 to 429.

9. Defendant not a transient person within the Act of Assembly.

10. Ordinance void, as in restraint of trade. *Wil. on Mun. Corp.* 144, sec. 342.

Ruffin, C. J. The Court sees no reason to doubt, that, for the purpose of local police, the charter of a town may constitutionally authorise the inhabitants to tax themselves, or do so through persons chosen by them. It is a convenient and almost a necessary power, and has been almost universally delegated and exercised, and, we believe, never questioned before. We perceive no objection to it. In the argument it was urged as an objection to it in this case, that it could not extend to the defendant, who is a stranger, but is to be confined to the members of the corporation. But the objection does not seem to us to be sound. In the first place, it is to be remarked, that the charter and ordinance are not directed against the defendant as coming from Virginia. They make no distinction between the citizens of this and other States or countries; as they operate alike on all persons, not before settled in the town, unless they go there to become permanent traders, or were inhabitants of New Hanover and assessed for taxes in that county. Then, it is also not true, that the defendant is to be treated as a stranger, so as not to be bound by the ordinance. For, it is set-

tled, that by coming within the town and acting there, a person becomes liable as an inhabitant and member of the corporation. *Commissioners of Plymouth* v. *Pettijohn*, 4 Dev. 591. *Whitfield* v. *Longest*, 6 Ired. 268. It is just that it should be so; for as the defendant has in the security of his property the benefit of the night watch and of the other police establishments, he ought to contribute reasonably towards their expense; and this tax allowed by the legislature, or viewed in itself as an annual imposition, cannot be deemed unreasonable.

But, while the power of self taxation, may be rightfully conferred on municipal corporations, it is undoubtly true that the power may be restrained and regulated by law, and that commissioners of a town can only exercise it in the manner and within the limits prescribed by the legislature. On this ground we think the defendant was entitled to judgment, as he became a trader in the town in 1846, and there was no tax laid for that year, at least, not lawfully. Each of the statutes given in evidence, enacts, that the commissioners shall "annually lay" the taxes mentioned in them. Such are the express terms of the Acts of 1784 and 1806. The reasons for thus restricting the power are sufficiently plain. No more revenue ought to be levied than may be requisite for useful expenditures; and, as the latter may and, probably, will vary from year to year, so ought the former. Besides, the commissioners themselves are chosen annually; and it is natural to expect that the power of taxation by each set of commissioners should be limited by their term of of office, because by that means there is secured to the inhabitants of the town a wholesome check against oppressive taxation and extravagant expenditures. These considerations are not, indeed necessary to aid in the construction of the two first Acts; for, as has just been mentioned, both that of '84 and 1806 are positive, that the taxes shall be *laid* annually. The language of that of

1811, it is true, is not quite so explicit. By it the commissioners "are empowered to lay an additional annual tax, as follows:" and one of those enumerated is that of $25 on transient shop-keepers. Possibly, if this Act stood by itself, it would admit of an argument, that it did not mean that the tax should be imposed annually, but only that, whenever imposed, not more than that sum should be levied in and for any one year. But, when construed with the parts of the charter contained in the two preceding acts, and with reference to the considerations of policy before and verted to, we think the just interpretation of the last act clearly is, like the others, that the tax must both be laid annually and be limited to the sum of $25 annually. No reason can be conceived, why the taxes authorized by the act of 1811 on horses, carriages, drays, carts, and transient traders should be permanent, while all others were to be laid from year to year, so as to correspond with the annual exigencies of the town and the varying ability of the people. On the contrary, all the acts, being in *pari materia*, are to be construed together; and they mean that all the town taxes should be laid, as well as collected, year by year. The ordinance of January 2, 1844, does not purport to extend to the year 1846, and, possibly, was not intended to operate beyond 1844. If, however, it was so intended, then the Commissioners exceeded their power, and for the excess, at all events, the ordinance was void. In either case the defendant did not owe the tax demanded of him; and therefore the judgment must be reversed and a *venire de novo* awarded.

Per Curiam. Judgment reversed and *venire de novo*.

THE STATE *vs.* EPHRAIM LANE.

A free person of color, who is employed to carry a pistol from one place to another, and who claims no right to use the instrument and has no intention of doing so, does not come within the provisions of the Act of 1840, prohibiting free persons of color from having arms in their possession without a license from the County Court.

Appeal from the Superior Court of Law of Perquimans County, at the Spring Term, 1848, his Honor Judge SETTLE presiding.

The defendant, a free man of colour, was indicted under the act of 1840, ch. 30, for unlawfully carrying about on his person, and unlawfully keeping in his house, a pistol, without having obtained a license therefor, from the proper authority. By the special verdict, it is found, that the defendant usually resides in the County of Perquimans, and, at the time the alleged offence was commited, was in the employment of a white man, by the name of Barker, getting shingles in the County of Pasquotank. Barker also lived in Perquimans, and had hired the defendant to carry the pistol with other articles of his, to the County of Pasquotank, where they were pursuing their work. While so employed in carrying the pistol and other property, it was seen in his possession. For this possession, the defendant was indicted, and did not pretend that he had any license therefor, from the County Court of Perquimans. Upon this special verdict the Court pronounced the defendant not guilty, and the Solicitor for the State appealed.

Attorney General, for the State.

No counsel appeared in this Court for the defendant.

NASH, J. It appears to us that a mere statement of the facts is an answer to the charge. At the time the act complained of was committed, the defendant was the servant of Barker, and as a hireling, was engaged in *his* business, in carring the pistol and other articles, from the place of his residence to that of his employment. It is not pretended, that this employment was simulated, and intended or used as a cloak to avoid the law. We must presume therefore that the contract was made in good faith between Barker and the defendant, and that the latter in good faith was executing it. Can it be possible, that under the Act of 1840, the defendant was guilty of a criminal act? The object of the legislature was to prevent the owning or possessing, by this class of persons, of the offensive weapons enumerated, as dangerous to the peace of the community and the safety of individuals. But that they did not intend, that they should not be owned or possessed by any person of colour, is evident from the fact, that they have rendered the possession lawful in one contingency. Degraded as are these individuals, as a class, by their social position, it is certain, that among them are many, worthy of all confidence, and into whose hands these weapons can be safely trusted, either for their own protection, or for the protection of the property of others confided to them. The County Court is, therefore, authorised to grant a licence to any individual they think proper, to possess and use these weapons. It is an old maxin in the construction of statutes, that he who sticks to the letter, adheres to the bark. Every legislative act ought to receive a reasonable construction; such as carries out the legislative will. The act charged against the defendant does not come within the limit or scope of the statute of 1840. He did carry with him a pistol, but it was not unlawfully carried. He was complying with a contract, he had a right to make, the mere carrier of the pistol for hire, claiming

no title to the instrument or right to use it, and without any purpose, or intention so to do.

Ordered to be certified that there is no error.

PER CURIAM. Judgment affirmed.

THE STATE *vs.* DOUGALD MUNROE & AL.

Although a *certiorari* has once been issued upon a suggestion of a defect in the record, and returned; yet the Court may, upon a further suggestion, a second time or oftener, direct writs of *certiorari* to issue, if it sees reason to think the transcript defective.

The case of the *State* v. *Reid*, 1 Dev. & Bat. 382, cited and approved.

Appeal from the Superior Court of Law of Cumberland County, at the Spring Term, 1848, his Honor Judge BAILEY presiding.

The indictment in this case, was returned to the June term, 1846, of Cumberland County Court, and the defendants, being convicted, appealed to the Superior Court. Upon a suggestion of a diminution of the record, in the latter Court, a writ of *certiorari* was, on motion, ordered to bring up a more perfect transcript. Upon the return of this writ, an affidavit was filed by the prosecutor, alleging the transcript was still defective; whereupon the Court ordered another or an *alias* writ, as it is termed in

the proceedings, to issue. From this order the defendants were allowed to appeal to this Court.

Attorney General, for the State.
Strange, *D. Reid* and *McRae*, for the defendants.

NASH, J. An appellate Court acts upon the transcript of the record from the Court, granting the appeal, and it is the duty of the Court to have before them a true copy, in order that justice may be done between the parties. Upon its being made to appear that the copy is not a true and full copy, the Court has the power, and it is its duty, to cause a perfect transcript to be filed. This is not denied, but it is said the power of the Court is exhausted by the first order. For this position no reason is or can be assigned. In truth the same reason exists for a second or third *certiorari*, as the first; the duty of the Court to have before them a full copy. The want of truth is the only suggestion that can authorise the Court to require another transcript. If that suggestion be made a second time, or oftener, *and the Court sees reason to think the transcript defective*, it *may* order other writs of *certiorari* to issue. *State* v. *Reid*, 1st Dev. & Bat. 382. The Court, in this case, did see reason to believe that the second transcript was defective, and, in the legitimate exercise of its power, ordered a second *certiorari* to issue. In this we see no error.

PER CURIAM. Ordered to be certified accordingly.

HENRY GODSEY *vs.* JAMES BASON.

Where a debtor removes out of a County, with intent to defraud his creditors, a person, who, knowing of such intent, helps him by carrying him or his property a part of the way, in order to assist him in getting him out of the County, becomes bound for his debts, (under our Act of Assembly,) although he did not convey the debtor or his goods entirely out of the one County into another.

Where a person, who has removed a debtor out of a County, is sued by a creditor, it is not necessary to shew that this person had a knowledge of any particular debt due by the debtor, but it is sufficient, if the circumstances of the case induce the jury to believe, that the removal was made with a view to defraud creditors.

In an action under our Act of Assembly, concerning the fraudulent removal of debtors, the measure of damages is the amount of the debt due by the debtor to the plaintiff.

Appeal from the Superior Court of Law of Rockingham County, at the Spring Term, 1848, his Honor Judge PEARSON presiding.

This is an action on the case brought February 28th, 1845, on the act of 1820, for aiding and assisting in removing one Thomas Sharp from Rockingham County, with the intent to hinder and defraud the plaintiff of a debt, which Sharp owed him. Pleas: Not guilty, release, and accord and satisfaction.

On the trial, the plaintiff gave evidence, that in November 1841, he paid for Sharp, and as his surety, the sum of $94 56 to the present defendant, as the agent of the person to whom the money was due; and that both the plaintiff and Sharp, and also the defendant, lived in Rockingham, from that time until the removal of Sharp, which is the subject of this action.

The plaintiff gave further evidence tending to shew an agreement between Sharp, the defendant, and his bro-

ther Isaac Bason, that the two latter should assist Sharp, to remove from the County and State to the Holstein river in Virginia, in order to avoid his creditors, and that, in excution of it, Isaac Bason furnished a wagon, which, at a time agreed on, he had in readiness at a place in Rockingham, about five miles from Sharp's residence; and that, on a certain day in August 1843, Sharp and his family, with the knowledge of the defendant, absconded on foot, in the night time, and went from Rockingham into Stokes County, and, on the same night, the defendant, at Sharp's request, carried a bed and furniture and a box with sundry articles in it from Sharp's residence to the wagon, at the place appointed, and delivered them to the wagoner, to be carried, and, by the defendant's directions they were carried, that night, to Sharp in Stokes County, and thence with him and his family to the Holstein.

Evidence was then given on the part of the defendant, that, when Sharp went off, he was very much involved in debt, and had but little property, and that consisted of household, and kitchen furniture and a small stock; of all of which he disposed before he left, except a cow, which the defendant got, and the goods which the defendant carried to the wagon, and some articles, which Sharp and his family carried with them.

The defendant further gave evidence, that, soon after Sharp went away, the plaintiff said, Sharp gave him up papers before he left, and, if he succeeded in collecting them, he hoped he would not lose much after all.

The counsel for the defendant thereupon moved for the following instructions:

First—That if the jury believed, that Sharp had paid or satisfied the plaintiff's debt before his removal, they ought to find for the defendant. The Court informed the jury, that there was no evidence of such payment or satisfaction; and for that reason declined giving any further instruction on that point.

Secondly—That, as an action arose to the plaintiff against Sharp in November 1841, and, so, was barred by the statute of limitations when this suit was brought in February 1845, the plaintiff could not recover in this suit; or, at all events, that the jury might take that circumstance into consideration on the plea of satisfaction. But the Court refused to give either part of the instruction.

Thirdly—That, as the defendant did not remove the goods of Sharp out of the County of Rockingham, he was not liable in this action, although he removed them five miles within that County, in part performance of a general plan, for a removal out of the State, with intent to hinder Sharp's creditors. The Court refused also to give this instruction.

Fourthly—That there was no evidence that the defendant knew, at the time of the removal, that Sharp was indebted to the plaintiff; and that, without such knowledge on the part of the defendant, he was not liable to the plaintiff.

The Court refused to give the instruction as prayed for; and instructed the jury, that it was not necessary the creditor should prove, that a person, aiding his debtor to remove, was expressly notified of the existence of the debt, but it was sufficient if he had knowledge of any facts that would put him on enquiry, whereby he might find out the debt; and, further, if they should find that the plaintiff, as surety for Sharp, paid the debt of $94 56 to the defendant, and that all those persons lived in the same County, and that Sharp was generally reputed, from the time of the payment to his removal, to be insolvent, that those circumstances were sufficient to put the defendant on such enquiry.

Lastly—The counsel for the defendant moved the Court to instruct the jury, that, if they should find for the plaintiff, they might take into consideration the state of Sharpe's property, and assess only the actual damages, sustained by the plaintiff, from the removal of an insol-

vent debtor. But the Court refused, and instructed the jury that the amount of the debt was the proper measure of damages.

The plaintiff obtained a verdict and judgment, and the defendant appealed.

Morehead, for the plaintiff.
Kerr and *Iredell*, for the defendant.

RUFFIN, C. J. The Court is of opinion, that neither of the exceptions can be sustained, and that the judgment must be affirmed. It is true, if the plaintiff had received payment from Sharp, so that no debt existed, this action would not lie. But it was held correctly, that there was no evidence from which the payment could be justly inferred. The declaration of the plaintiff, that Sharp left "some papers" with him, and, if he could collect them, he hoped not to lose much, is too vague to authorise a finding of satisfaction. There is nothing to point out what the "papers" were, or that they were received in satisfaction. If it may be assumed, that they were securities for money deposited with the plaintiff as an indemnity, it does not appear, that they were on solvent persons, nor what was their amount, nor that they were then, or even now, due; much less that they had been collected. Under such circumstances it could not be judicially held, that any part of the debt had been paid.

Upon the point respecting the statute of limitations, it is to be noticed, that two years had not elapsed between the payment of the money by the plaintiff, and the removal of Sharp. It is unnecessary, therefore, to consider, whether a person, sued for fraudulently removing a debtor, can insist on the defence, that the statute would, at the time of the removal, have barred an action against the debtor; or, if he can, whether it may be done on the general issue, or must be pleaded. Those points do not arise in the case; for the plaintiff was entitled both to

his debt, and to his action against Sharp, when he was removed.

By removing him, an action arose against the present defendant for the debt, which might be brought at any time within three years; and the plaintiff was under no obligation to prosecute Sharp further. Consequently, it cannot affect the remedy against the defendant, that, afterwards, the time ran so as to become a bar to an action against the original debtor. The remedies are of different natures and independent; and, while the debt exists, the creditor may take his remedy against either of the parties, or, indeed, proceed separately against both of them at the same time.

It is true, that removing a debtor from one to another part of a county, though with the intent and expectation at the time, that the debtor should remove out of the county, is not within the Act, if the debtor do not actually carry the intention into execution. For it is the removal out of the county, which makes the person, removing a debtor, liable for his debts, and the parties may change their purposes. But that was not the case here, as the fact was undisputed, that Sharp did go out of the county, according to the original design; and, in such a case, a person who helps him by carrying him or his property a part of the way, in order to assist him in getting out of the county, becomes bound for his debts, although he did not convey the debtor or his goods entirely out of the one county into another. The statute is remedial, for the prevention of frauds on creditors, and is entitled to a liberal interpretation. It would be a fraud on it to allow it to be evaded by carrying the debtor to the county line. But, in truth, the case is within the words, as well as the meaning of the Act. For, not only removing, but "aiding or assisting" in removing a debtor, with intent to defraud his creditors, makes a person liable for all debts in the county.

The Court concurs also in opinion, that the circumstances mentioned by his Honor were sufficient to be left to the jury to charge the defendant with a knowledge of the plaintiff's debt, if such knowlege were necessary to that purpose. But we think very clearly that it is not one, who, removes a debtor with the fraudulent purposes to put him or his property beyond the reach of his creditors generally, that is liable for all he owes in the County, though he have not specific notice of particular debts, nor even suspects their existence. The language of the act is, that any person, who shall remove a debtor out of any County with intent to defaud "the creditors of such debtor, shall be liable to pay, all debts" which the debtor may justly owe in the County, and not those only of which he knew, or had reason to believe the existence. It is necessary, indeed, that the party should have some knowledge or belief of an indebtedness of the person removed, in order to authorise an inference of an intent to defraud creditors. But when, from direct evidence, or from the circumstances of the case, such as the general known pecuniary condition of the person removed, and the secret manner of the removal, the jury is satisfied of the general purpose to help the debtor to escape from his creditors, the act attaches, and gives to every creditor, this remedy, although he, who removed the debtor, might have had no knowledge of the particular debt, and could therefore have had no intent to defraud one creditor in particular. A contrary construction would defeat the act altogether, as it must be almost impossible to fix the party with precise knowledge of the various debts, or even to show enough to put him on enquiry as to the specific debts. The true principle of construction of this act is that applied to *Stat.* 13 *Eliz.* which is, that what is fraudulent as to one creditor, is fraudulent as to all creditors, or, at least, all existing at the time. Both the policy and the words of the act of 1820, require this construction.

With respect to the measure of damages, the langage of the act leaves no discretion in the Court or the jury. The enactment is positive, that a person removing, or aiding in removing a debtor, "shall be liable to pay *all debts*" in the County; "which *debts* may be recovered by the creditors respectively by an action on the case."

PER CURIAM. Judgment affirmed.

THE STATE *vs.* JOHN BISHOP & AL.

Keeping a gaming table, called "Shuffle-board," is not indictable, under our Act of Assembly, concerning gaming, the jury having found that this is not a game of chance, but one of skill.

Appeal from the Superior Court of Law of New Hanover County, at the Spring Term, 1848, his Honor Judge BAILEY presiding.

The indictment charges that the defendants did erect, keep up, and use a certain public gaming table, called by the name of Shuffle-board, at which games of chance were played, contrary to the form of the statute. The jury found specially, that the defendants kept up the public gaming table called Shuffle-board, as charged, and that divers persons played thereat and bet spirituous liquors on the games, but that the said games were not games of chance, but were altogether games of skill;

and referred the question to the Court whether in law the defendants were guilty or not guilty. The Court was of opinion with the defendants and gave judgment accordingly, and the Solicitor for the State appealed.

Attorney General, for the State.
D. Reid, for the defendant.

RUFFIN, C. J. The game, which is the subject of the indictment is, probably, the same that is mentioned in *Stat.* 16 *Car. I*, c. 7, under the name of "Shovel board." But that is only conjecture, as the members of the Court know nothing of either game; and we should be altogether unable, without explanatory evidence, to judge of the character of that under consideration. But the jury have found it not to be a game of chance; and, if it be otherwise, the verdict does not set forth the mode of playing it, so as to enable the Court to see any contradiction in the verdict. Therefore it must be taken, that Shuffleboard is not a game of chance. That settles the question in favour of the defendants under this indictment and under the statute on which it is founded. For the act only makes the keeping of those public tables indictable, at which games of chance are played; and the indictment, properly following the act, charges that at this table "games of chance were played." The verdict then negatives the indictment, and takes the case out of the act; and there was no error in the judgment.

PER CURIAM. Ordered to be certified accordingly.

SIMON M. SMITHWICK, CHAIRMAN, &c. vs. HENRY WILLIAMS.

Wardens of the Poor, who are elected by the County Court, under the provisions of the Act of 1846, ch. 64, are not subjected to any penalty for refusing to accept the appointment.

Penal statutes cannot be extended by equitable construction beyond the plain import of their language.

Appeal from the Superior Court of Law of Martin County, at the Spring Term, 1848, his Honor Judge CALDWELL presiding.

The action is debt for a penalty of $20, for refusing to serve in the office of Warden of the Poor, to which the defendant was elected by the County Court of Martin, at April term, 1847. Many objections to the recovery were taken for the defendant; among which was one, that the defendant, having been elected under the Act of 1846, c. 64, was not liable to a penalty. A verdict was taken for the plaintiff subject to the opinion of the Court on that and other points of law. The presiding Judge afterwards held, that the penalty existed under the Act of 1777, of which that of 1846 was an amendment, and judgment was entered against the defendant, and he appealed.

No counsel appeared in this Court for the plaintiff.
Biggs, for the defendant.

RUFFIN, C. J. Without adverting to any other of the points reserved, the Court deems the judgment erroneous, upon the ground, that no statute imposes a penalty on the defendant. That of 1846, under which he was elected

by the County Court, gives none. The case then depends on the previous Acts. Up to 1846, Wardens of the Poor were elected by the freemen of each County; and, in case any so chosen refused to serve, or died or removed, others were appointed in their stead by those who did act—as provided in the Acts of 1777 c. 117, and 1783 c. 191. The former required overseers of the Poor to elect two of their members Wardens; and it gave a penalty of £5 against an overseer "elected according to this Act" for refusing to serve, to be recovered by the Wardens to the use of the Poor; and it also gave a penalty of £20 against a Warden for refusing to serve, to be recovered by an informer, one half to his own use, and the other half to the use of the Poor. The Act of 1783 provided, that all the overseers should be Wardens of the Poor, and that all persons, "duly elected" Wardens, and refusing to qualify, should forfeit £10, to be recovered in any Court of record by the County Trustee, and applied to the use of the County. In the revision of 1836, c. 89, those two acts are re-enacted as to the periods and modes of electing these officers; and, in respect to the penalties it is provided, "that every person *elected a Warden of the Poor according to this Act*, who shall refuse or neglect to qualify, shall forfeit the sum of $20, to be recovered in any Court of record by the Chairman of the County Court, in an action of debt to the use of the County." Then comes the Act of 1846, "to alter the modes of electing Wardens of the Poor;" which provides that the County Courts shall, at the first term after the first day of January, 1847, elect Wardens to serve for three years, and repeals so much of the first section of the 89th chapter of the Revised Statutes, as relates to the time and manner of electing Wardens.

From this compendium of the previous legislation, it seems clear, upon the principles of construction applicable to penal enactments, that no one of the acts covers this case, so as to subject the defendant to this penalty.

Those of 1777 and 1783 gave penalties of different amounts and recoverable by different persons. Besides, those Acts were not in force after January 1838, when the Revised Statutes went into operation. Therefore the *Rev. Stat.* c. 89, is the only one that bears on the point. That does not, like the Act of 1783, give the penalty against all persons "duly elected," who shall refuse to qualify; but s. 4, it adopts the terms used in the Act of 1777, that every person, "elected according to *this* Act," who shall refuse to qualify, shall forfeit $20, to be recovered by the Chairman of the County Court. Penal statutes cannot be extended by equitable construction beyond the plain import of their language; and the words here expressly restrict the penalty to the Wardens elected according to that Act, that is to say, by the people of the County or by the acting Wardens in case of vacancies by refusal, removal, or death. Judging from the special terms of the repealing clause in the Act of 1846, it is very probable, as was said in argument, that the legislature had no intention to abolish the penalties of the Act of 1836. Indeed, it may be true, that persons, appointed by the acting Wardens to supply vacancies, may still be liable for those penalties. But that does not enable the Court to include Wardens, elected by the County Court, within an Act, which in special terms expressly gives the penalty against such Wardens as were elected by the people, or by the Court of acting Wardens, and refused to serve. The silence of the Act of 1846, as to new penalties on the persons elected under it, or as to the extension to them of the penalties of the Act of 1836 against the Wardens chosen as therein directed, may probably be another example of inadvertent omission and imperfect legislation, incident to attempts to effect particular changes by persons, who are not fully informed, or who will not take into view the whole subject to which a bill relates. Certain it is, however, that the Act of 1846 creates no penalty; and that while it does not ex

pressly repeal those given by the Act of 1836, yet the words of the Act of 1836, in themselves, do not include the case of the defendant, but are strictly confined to persons elected in a different manner.

The judgment must therefore be reversed, and a *venire de novo* awarded.

PER CURIAM. Judgment reversed and *venire de novo.*

THE STATE *vs.* JOHN GUPTON.

The game of Ten pins is not a game of chance, and therefore persons playing at it are not indictable under our Act of Assembly, *Rev. Stat. chap.* 34, *sec.* 68.

Appeal from the Superior Court of Law of Nash County, at the Spring Term, 1848, his Honor Judge CALDWELL presiding.

The defendant was indicted, with two others, for playing together "at a certain public gaming place called a *Ten-pin-alley*, a certain game of chance called Ten pins, and betting money thereat," contrary to the statute. Upon not guilty pleaded the defendant was tried alone.

Evidence was given for the State, that a Ten-pin-alley was kept up at a public place, where spirituous liquors were retailed, and that the defendant, with others charged, played the game of Ten pins for money. Evidence was futher given, that the game is thus played. Ten pins or blocks of wood are set up at one end of a platform sixty feet long and four feet wide, and the players stand at the other end and thence bowl a wooden ball at the pins, and he who knocks down the greater number of the pins, is the winner.

For the defendant it was contended, that the case proved was not within any statute. But his Honor was of opinion, that, under the broad words of the Act of Assembly, the facts constituted an indictable offence, and the jury convicted the defendant, and after sentence, he appealed.

Attorney General, for the State.
No counsel for the defendant.

Ruffin, C. J. The legislature has wisely set its face against the idle and vicious practice of gaming; and to that end has passed various laws, calculated more or less to suppress it. But no one of them, we believe, reaches the present case. Besides avoiding all securities for money won at play, certain kinds of gaming are made criminal. Playing at cards in a public house, and betting thereon, and suffering such gaming at cards by the keeper of the house, or supplying the players with refreshments, are forbidden and distinctly made indictable. Against public gaming tables also there are several provisions. E. O., A. B., and A. B. C., faro banks, pass die tables, or any other table or bank of the same or like kind under any denomination, are forbidden to be used in this State, and heavy penalties given against any one, who keeps or uses them or who suffers games to be played at them in his house; and authority is given to certain offi-

cers to destroy the tables, and seize all money staked or exhibited. *Rev. Stat.* c. 34, s. 64, &c. None of those enactments sustain this indiement. Except as to gaming at cards, forfeitures and pecuniary penalties alone are enacted; and not indictment. To supply that omission the legislature passed the act of 1835, which is incorporated into the present statute. *Rev. St.* c. 34, s. 68. It is the only provision on which reliance is placed in support of this indictment, and is, no doubt, the one on which the indictment was drawn. It enacts that, in addition to the penalties before prescribed, any person, who shall construct, erect, keep up, or use any public gaming table or place, at which games of chance shall be played, by whatever name called, and every person, who shall play at any of the forbidden gaming tables any game of chance and bet thereon, shall be guilty of a misdemeanor, and upon indictment and conviction shall be punished as prescribed by the Act. The question, then, is the narrow one, whether "ten pins," as it is described in the exception, is a game of chance, or not. The phrase, "game of chance," is not one long known in the law and having therein a settled signification, but was introduced into our statute book by the act of 1835. As it had no technical meaning, as a legal expression, it must have been used by the legislature in the sense in which persons conversant in games, or the world at large, give to it in classing the different kinds of games. Therefore it is apparent, that those games are specified in contra-distinction to other games, which are not games of chance. In other words, those terms must be understood in their plain, popular sense, as descriptive of a certain kind of games of chance in contra-distinction to a certain other kind, commonly known as games of skill. Though our knowledge on such subjects is very limited, yet we believe, that, in the popular mind, the universal acceptation of "a game of chance" is such a game, as is determined entirely or in part by lot or mere luck, and in which judgment, practice, skill, or

adroitness have honestly no office at all, or are thwarted by chance. As intelligible examples, the games with dice, which are determined by throwing only, and those, in which the throw of the dice regulates the play, or the hand at cards depends upon a dealing with the face down, exhibit the too classes of games of chance. A game of skill, on the other hand, is one, in which nothing is left to chance; but superior knowledge and attention, or superior strength, agility, and practice, gain the victory. Of this kind of games chess, draughts or chequers, billiards, fives, bowles, and quoits may be cited as examples. It is true, that in these latter instances superiority of skill is not always successful—the race is not necessarily to the swift. Sometimes an oversight, to which the most skilful is subject, gives an adversary the advantage; or an unexpected puff of wind, or an unseen gravel in the way, may turn aside a quoit or a ball and make it come short of the aim. But if those incidents were sufficient to make the games, in which they may occur, games of chance, there would be none other but games of that character. But that is not the meaning of the statute; for, as before remarked, by the very use of those terms, the existence of other kinds of games, not of chance, is recognised. The incidents mentioned, whereby the more skilful may yet be the loser, are not inherent in the nature of the games. Inattention is the party's fault, and not his luck; and the other obstacles, though not perceived nor anticipated, are occurrences in the course of nature and not chances. They are, indeed, sometimes inaccurately called so, as one hears "chances of war" used to excuse losses by means not foreseen, but which might, and, though out of the usual course of things, ought to have been foreseen, and provided against. For the art of war is surely a science, and the results of certain powers, movements, and combinations may be almost mathematically calculated. In the same manner comparing small things with great, these are games of skill—purely such

although the better player may, in particular instances, fail to win, from such causes as those mentioned, the want of attention or energy, and not the blindness of chance. In that sense ten pins, as understood by us from the description in the case, is not a game of chance, but of skill. Nothing is referred to chance; but, as in billiards, a just estimate of distances and angles, steadines of hand, and a due application of strength constitute, under ordinary circumstances, the judicious and successful player. We take this game to be one species of the game known in England, and spoken of in her statutes, under the general term of *Bowls;* and if it be, there is legal authority for holding it not to be a game of chance. The phrase is found in a statute of 5th *Geo.* 4, which enacts, that every person playing or betting, in any open or public place, at or with any table or instrument of gaming, "at any game, or pretended game of chance," may be punished as a vagrant. Mr. CHITTY states that playing at bowls is not within the act, 3 *Chit. Cr. L.* 673. So in *Sigel* v. *Jebb*, 3 Stark. C. 1. Chief Justice ABBOTT held, that all games for money, "whether of skill or of chance," were unlawful within the meaning of *St.* 9, *Ann.* and remarked particularly, that playing at bowls had been held to be within that statute, "and yet that was not a game of chance." In like manner bowls and ten pins are certainly within our act avoiding gaming contracts. But, for the reasons assigned, we do not think that those, and other games of the like kind, are games of chance, within the other act of 1835, so as to render the players indictable.

Per Curiam. Judgment reversed, and *venire de novo*.

JAMES BEAL *vs.* MARRIOTT ROBESON & AL.

Where in an action for a malicious prosecution it became material to enquire, whether a party was drunk at a particular time, he may give evidence by witnesses, who have known him long and intimately, that he was not addicted to drunkenness; but he cannot give in evidence his general reputation of being a sober man.

In civil cases the general rule is, that, unless the character of the party be put directly in issue, by the nature of the proceeding, evidence of his character is not admissible.

In an action for a malicious prosecution, in order to rebut the imputed malice, the defendant may shew, that he had consulted counsel learned in the law, upon a full and fair statement of all the facts of the case, and acted according to his advice: but it is incompetent for him to prove that he consulted with an unprofessional man and followed his advice, in order to shew that he acted *bona fide* and without malice.

The case of *McRae* v. *Lilly*, 1 Ired. Rep. 118, cited and approved.

Appeal from the Superior Court of Law of Chatham County, at the Spring Term, 1848, his Honor Judge PEARSON presiding.

After the new trial granted in this case at June term, 1847, (see 7 Ire. Rep. 280) it was again tried at Chatham, on the Spring circuit of 1848, when the defendants had a verdict and judgment, and the plaintiff appealed. In the bill of exceptions it is stated, that, upon the question of probable cause, much testimony was given on both sides, but it is not set forth, for the reason that his Honor charged, that there was no probable cause for the prosecution, and no exception was taken to the charge.

To show that the defendants had acted with malice, the plaintiff contended that the defendant Robeson had not been robbed at all, that he went from Pittsborough very drunk, and on his way home fell from his horse, and hurt

his head, and thereby received the injury, which he swore that the plaintiff and his associates had inflicted upon him. As to the fact whether he was drunk when he left Pittsborough, the testimony was contradictory, one witness swearing that he was very drunk, another that he was only intoxicated, and a third that he was neither drunk nor intoxicated, but had only taken a dram.

The defendant, Robeson, then offered to prove by witnesses, who had known him intimately for the last thirty years, that he was not addicted to drunkenness, and that although he would take a dram, they had never known him to be drunk, and that he bore the character of being a sober man. This testimony was objected to by the plaintiff, but was admitted by the Court.

To disprove the allegation of malice, the defendant, Robeson, offered to show by one Isaac Holt, that the witness was a Justice of the Peace in the County of Orange and had acted as such for many years; that the defendant formerly lived near him, and was in the habit, as were the other neighbours, of advising with him on legal questions; that the defendant afterwards removed to the County of Chatham, and the next day after he had received the injury complained of, the witness, who was in the neighborhood on a visit, called to see him and the defendant then stated to him the circumstances, under which he had been robbed, and the facts tending to show, that the plaintiff was one of the persons concerned in the act, and asked his advice as to the proper course for him to pursue; and the witness advised him that it was his duty to take out a State's warrant against the plaintiff. This testimony also was objected to by the plaintiff, but admitted by the Court. After the verdict for the defendants, the only ground, upon which a new trial was asked, was for the improper admission of testimony. A new trial was refused and the plaintiff appealed.

McRae, for the plaintiff.

Waddell, for the defendants.

BATTLE, J. The testimony offered by the defendant to prove, by witnesses who had known him long and intimately, that he was not addicted to drunkenness, was properly admitted. This habit in the use of ardent spirits was a fact, which might well be within the knowledge of the witnesses, and to which they might testify, as it was relevant to the subject of enquiry, to-wit, whether the defendant was drunk at the time spoken of by the other witnesses. But we think that there was error in admitting the testimony for the purpose of proving that the defendant had the character of being a sober man. "In civil suits, the general rule is, that unless the character of the party be put directly in issue by the nature of the proceeding, evidence of his character is not admissible." *McRae* v. *Lilly*, 1 Ired. Rep. 118. Here the character of the defendant for sobriety was not put directly in issue, and we can see no reason to take the case out of the general rule.

The other testimony, offered by the defendant to disprove malice, was inadmissible and ought to have been rejected. When a party consults counsel learned in the law, upon a full and fair statement of all the facts of the case, and acts according to his advice, that circumstance may be proved to show that he acted *bona fide*, and without any malicious intent. *Blunt* v. *Little*, 3 Mason's Rep. 102. *Hewlett* v. *Cruckley*, 5 Saund. Rep. 277, (1 Eng. C. L. Rep. 107,) 2 Stark. Ev. 495. We have neither seen nor heard of any case, where the opinion of an unprofessional man, taken by the defendant, has been admitted to show that he acted in good faith and without malice. In the case of *Blunt* v. *Little*, Judge STORY says, that "it is certainly going a great way to admit the evidence of any counsel, that he advised a suit upon a deliberate examination of the facts, for the purpose of repelling the imputation of malice, and establishing probable cause:"

and in *Hewlett* v. *Cruckley*, the rule is laid down by the Court, after an *advisari*, with evident caution, and with some doubts as to its correctness. We do not feel at liberty to carry it farther, by admitting testimony of the opinion of any gentleman, however respectable, who has not qualified himself for giving advice upon questions of law, by studying it as a science, and pursuing it as a profession. This Court certainly did not intend to do so, when this case was formerly before it. The persons, to consult whom it is stated, in the opinion then delivered, to be the duty of a party who conceives himself aggrieved, and is about to institute a criminal prosecution, are gentlemen of the legal profession, and not those, who in point of qualification to advise upon such questions, stand no higher than the party himself.

The judgment must be reversed, and a new trial granted.

PER CURIAM. Judgment reversed and new trial granted.

DEN ON DEMISE OF JOHN R. GILLIAM *vs.* JOHN W. BIRD.

It is an inflexible rule, that whenever both parties claim under the same person, neither of them can deny his right, and then, as between them, the elder is the better title and must prevail.

A house, or even the upper chamber of a house, may be held separately from the soil, on which it stands, and an action of ejectment will lie to recover it.

A street in a town or any other high-way, though now dedicated to the use of the public, may have been, and probably was once the subject of private property, and therefore the ordinary doctrine of estoppel will apply to it.

A deed from A. to B. estops, not only A., but all who claim under him.

A plaintiff in ejectment is entitled to a verdict, if he can shew a wrongful possession in the defendant of any part, no matter how small, of what he claims in his declaration.

The cases of *Murphy* v. *Barnett*, 1 Car. L. Rep. 105, *Ives* v. *Sawyer*, 4 Dev. and Bat. 41, *Collins* v. *Benbury*, 3 Ired. 285, and *Huggins* v. *Ketchum*, 4 Dev. and Bat. 415, cited and approved.

Appeal from the Superior Court of Law of Bertie County, at the Spring Term, 1848, his Honor Judge SETTLE presiding.

This was an action of ejectment brought to recover a house and lot of land in the town of Windsor. The lessor of the plaintiff showed in evidence a deed from one David Ryan to himself, and proved that the building and lot mentioned in that deed are the same as those described in the declaration. The said deed is dated 4th Feb. 1841. He then proved that in 1843, at a sale of said David Ryan's property, one George S. Holley was present and requested John Freeman, the sheriff, to put up for sale the interest of the said David Ryan either in the building alone, or in it and the ground on which it rested, and the said lot of land; whether he requested any thing more than the building to be put up, there was conflicting testimony. The said

John Freeman therupon complied with said request and the said George S. Holley became the purchaser. The said Holley afterwards rented the said house to Dr. Robert H. Smith, who went into possession as tenant of said Holley, and continued in possession up to the time of the bringing of this action; first as the tenant of said Holley, and then as the tenant of the defendant, who had purchased of Holley whilst Smith was in possession. The defendant proved that the ground on which the building stood, and the said lot of land, formed, as early as 1815, a part of one of the public streets of the town of Windsor; that in 1832, or 1833, the building was placed where it now stands; that from the said year 1815, up to the year 1835, or 1836, the said street continued to be used as a public street, except that part of it covered by the said building after the year 1832 or 1833; that in 1835 or 1836, the fence enclosing said lot of land was put up. It was then proved that Smith, as the tenant first of Holley, then of Bird, who purchased of Holley, had been in posession of the said building, three years next, before the beginning of this action. The defendant contended, that the plaintiff could not recover; first, because Smith, the tenant of Holley and Bird, having been in possession of the said building more than three years before the commencement of this action, then if the jury should believe from the evidence, that the building only was sold, and not the ground on which it rested, nor the lot, the building is to be considered as personalty, and the defendant is protected by the statute of limitations.

Secondly, that this action cannot be sustained for the building without the ground on which it rests or the lot of land.

Thirdly, that the plaintiff had not made out a title for the ground on which the building was, and the lot belonged to the public.

Fourthly, that the ground on which the building stood, and the said lot, being part of a street, was not the

subject of a grant, and therefore no estoppel could arise, although poth parties might claim under the same person.

Fifthly, as no deed was shown from said Freeman, sheriff, to said Holley, nor from Holley to the defendant, the defendant was not estopped.

Sixthly, if the jury should be satisfied from the evidence, that Holley claimed only the building, and not the ground on which it stood, nor the lot, the defendant was not estopped.

His Honor instructed the jury, that the statute of limitations applied to the form of the action, and as this was an action of ejectment, the right of entry of the real owner was not barred until after seven years adverse possession of the defendant under colour of title; that, whether the deed conveyed the house or the lot of land, was a questson for the Court and not for the jury; that the deed from Ryan to the plaintiff conveyed an interest in real estate which could be recovered in an action of ejectment only; that as to the 3d, 4th, 5th, and 6th objections made to the plaintiff's recovery, his Honor instructed the jury, that the land, upon which the house stood, though formerly a part of the public street of the town of Windsor, was the subject of a grant, as all land in the State not covered by water was subject to entry; that though the plaintiff might not have the real title, yet as the plaintiff purchased the property of Ryan, if Holley purchased it as Ryan's property, and, claming title under Ryan, leased it to Smith, and afterwards sold it to the defendant Bird, that Bird would, as against the plaintiff, be estopped to deny Ryan's title, and that, in order to create an estoppel, a deed was not always necessary. But whether Holley claimed the title of Ryan, and whether he afterwards leased it to Smith, were facts for them to find.

The jury rendered a verdict for the plaintiff. Rule for a new trial. Rule discharged and judgment according to the verdict. Appeal to the Supreme Court.

(Copy of the Deed from Ryan to Gilliam.)

I have this day bargained and sold to Doctor John R. Gilliam for and in consideration of the sum of four hundred and fifty dollars all my right, title and claim to the building now occupied by negro Tom and formerly occupied by Doctor John Haywood and known as Haywood's shop, and do convey all the interest that I may have had to the ground occupied or covered by the house as well as the land enclosed by the fence around the building. In witness, &c. 4th Feb. 1841.

DAVID RYAN, (SEAL.)

Iredell, for the plaintiff.
P. H. Winston, Jun., for the defendant.

BATTLE, J. Many objections were urged against the recovery of the plaintiff's lessor in the Court below, and have been again pressed in the argument before us. We have given to them a due consideration and have carefully examined the reasons, which have been brought to their support. But, after all, we are compelled to say that they do not satisfy us that, the defendant's case can be exempted from the operation of the inflexible rule, that whenever both parties claim under the same person, neither of them can deny his right, and then, as between them, the elder is the better title and must prevail. *Murphy* v. *Barnett*, 1 Car. Law Repos. 105. *Ives* v. *Sawyer*, 4 Dev. and Bat. Rep. 51. The defendant's counsel, acknowledging the force of this rule, in all the cases to which it can apply, has tasked his ingenuity to show that his case does not come within it. Let us see to what extent he has succeeded. The first and second objections may be considered together, for whatever is an answer to one, is an answer to both. They must assume, that a house, separate and distinct from the ground on which it

stands, is personal property. But that is not so. The ownership of land is not confined to its surface, but extends indefinitely, downwards and upwards. *Cujus est solum, ejus est usque ad cœlum*, 2 Black. Com. 18. It includes not only the ground or soil, but every thing which is attached to the earth, whether by the course of nature, as trees and herbage, or by the hand of man, as houses and other buildings. *Co. Lit.* 4, *a*. A house, or even the upper chamber of a house, may be held separately from the soil, on which it stands, and an action of ejectment will lie to recover it. 3 *Kent's Com.* 401, note e. The other objections are urged more particularly against the application to this case of the doctrine of estoppel. It is said that the lot, upon which the house in controversy stands, is a part of one of the public streets of the town of Windsor; that a public street is not the subject of a grant by the State, and cannot of course become the property of a private individual, and that therefore no estoppel can arise in relation to it. In support of this argument the counsel relies upon the proposition laid down by this Court in *Collins* v. *Benbury*, 3 Ired. Rep. 285, that "it is very clear that a grant of a several fishery in the ocean or other navigable water by an individual, who could not acquire it from the State, must be merely void; and therefore it cannot estop." The cases are widely different, and the admission of the one furnishes no ground of support for the other. A several fishery in the ocean or in a navigable stream is not, and never has been, the subject of private ownership in this State, because land covered by a navigable water course, has always been expressly excluded from entry, and a grant of it by one individual to another would therefore exhibit on its face its own nullity. But a street or any other high-way, though now dedicated to the use of the public, may have been, and probably was, once the subject of private property, and a grant of the soil over which it passes need not, and ordinarily would not, ex-

pose its own invalidity. This being so, the decisive answer to the defendant's argument is, that he is just as much estopped from showing that the title is out of the plaintiff's lessor, and in the public, as that it is in any private person. It is said again, that the defendant is not estopped, because it does not appear that Holley, from whom he purchased, ever took a deed from the sheriff, or that he ever executed one to him. This objection is founded upon a misapprehension of the manner in which the estoppel arises in this case.

The deed from Ryan to the plaintiff's lessor estops Ryan from disputing his grantee's title, and the same estoppel extends to all persons who claim from or under Ryan, whether by deed or otherwise. *Murphy* v. *Barnett, ubi supra.* Holley took possession, by means of his tenant, of the house which he purchased at the sheriff's sale as the property of Ryan, and until the contrary appears, he must be presumed to have entered under the title acquired by his purchase. He cannot then dispute the title of Ryan, and that title had been previously conveyed to the plaintiff's lessor.

Another position is assumed in the argument here; that the deed from Ryan to the plaintiff's lessor conveys only a life estate, and that Holley purchased only the reversion in the house, that being all the interest, which Ryan then had in it, and that the estoppel could not extend to such reversion. All this may be true, and yet it cannot avail the defendant, because his vendor, Holley, entered into possession of the house immediately after his purchase, and he must therefore be taken to have claimed a present, and not a reversionary interest.

The last objection is clearly untenable. In the argument it is said, that Holley purchased, and took possession of the house only, and not the lot on which it stood, and that consequently he could be estopped for the house only. But that is sufficient for the lessor's purpose. He is entitled to a verdict, if he can show a

wrongful possession by the defendant of any part, no matter how small, of what he claims in his declaration. *Huggins* v. *Ketchum*, 4 Dev. and Bat. Rep. 415. The verdict and judgment in an action of ejectment, do not necessarily specify the part, for the trespass upon which the defendant is found guilty, and the lessor of the plaintiff must, in such case, take out his writ of possession at his own peril.

We have thus considered all the objections urged by the defendant against the recovery of the plaintiff's lessor, and finding them untenable, we must affirm the judgment.

PER CURIAM. Judgment affirmed.

JAMES H. POOL *vs.* JAMES WILLIAMS.

An indemnity obtained from a principal by one of two co-sureties, after the risk is incurred, enures equally to the benefit of both.

But where the surety merely had a deed of trust for certain property, as an indemnity, executed by the principal, and neglected to have it registered, so that the property was sold by other creditors, the co-surety is not entitled, on account of this *laches*, to make him responsible for the value of the property.

The cases of *Fagan* v. *Jacocks*, 4 Dev. 263, and *Hall* v. *Robinson*, 3 Ire. 56, cited and approved.

Appeal from the Superior Court of Law of Perquimans County, at the Spring Term, 1848, his Honor Judge SETTLE presiding.

This is an action on the case, brought, under the statute, by one surety of an insolvent principal against a cosurety for contribution.

The case was as follows. The firm of H. N. Williams and Co., composed of H. N. Williams and C. C. Green, did business as merchants in Elizabeth City, and made several promissory notes to different persons, which were also executed by the plaintiff and the defendant and one Proctor as sureties. The principals became insolvent, and some of the notes were afterwards paid by the plaintiff; and, after giving the defendant notice thereof and demanding an aliquot part of the sum paid by him, he brought this suit.

The counsel for the defendant in opening his case stated, that he claimed, that the value of certain slaves, which Williams and Green had conveyed to the plaintiff, should be deducted in the first instance from the amount paid by the plaintiff, and that he was liable only for a share of the balance, that would remain after such deduction. And in support of that defence, the counsel for the defendant offered to give in evidence a deed of trust, made by Williams and Green to the plaintiff, dated March 16th, 1841, and proved and registered December 2d, 1842, purporting to convey to Pool seven slaves in trust to indemnify him from loss, by reason of his having become one of the sureties in the notes of H. N. Williams and Co. before that time made and mentioned in the deed; being the same that were paid by the plaintiff and given in evidence in this action. And the counsel offered further to prove, that at the time the deed was executed Williams remarked to Green, "Mr. Pool will not have the deed proved and registered, unless it becomes necessary to do so for his security;" and the plaintiff then assented thereto: and further, that a memorandum in pencil on the deed in the following words, "To be proved and registered when I say so," was in the hand writing of the plaintiff; and farther that the said slaves remained, after the execution of

the deed, in the possession of Williams and Green and became liable to be sold and were sold for the satisfaction of the debts of Williams and Green, by reason that the said deed was not sooner proved and registered: and further the counsel offered to prove the value of the said slaves. But the Court refused the evidence, because it was irrelevant and incompetent to establish a defence at law, and only made a case of equitable cognizance. There was a verdict for the plaintiff, and after judgment the defendant appealed.

Heath, for the plaintiff.
Iredell, for the defendant.

RUFFIN, C. J. The case of *Fagan* v. *Jacocks*, 4 Dev. 263, and the recent one of *Hall* v. *Robinson*, 8 Ired. 56, establish, that there is no difference between the law and equity applicable to the rights and liabilities of cosureties, as they are involved in this suit. The jurisdiction is made concurent for the sake of the remedy merely, and not to change the rules which fix the rights of the parties. From the nature of things, where two Courts are required to take cognizance of the same subject, both Courts, in determining the right, must proceed on the same principles of law and justice: otherwise, although the jurisdiction be the same, the decisions will be in conflict. However perplexing, therefore, some of the questions, that may arise between sureties, may be to a Court of law, they must, in general, be entertained and decided as well as we can. As far, then, as the reason goes, on which the evidence was ruled out, the Court does not concur in the decision.

Nevertheless the Court is of opinion, that the judgment ought not to be reversed; because the evidence, if received, could not establish the defence, but admitting it all to be true, the plaintiff would be entitled to recover without any deduction, either at law or in equity.

The argument for the defendant is based on the equitable principles, that sureties are upon an equality, and hence that an indemnity, not stipulated for when the risk began, obtained by one surety, enures to the benefit of another. The soundness of those principles cannot be contested; and by the statute they are incorporated into the law. But the difficulty is to apply them to this case, so that the defendant can derive any benefit from them. It is to be noted, that the plaintiff has not misapplied a common fund to his own benefit, nor even given up the debtor's property, which had been effectually conveyed. The plaintiff, then says in answer to the defendant's claim, that he is willing to divide the deed of trust with him; nay, that he is welcome to the whole deed, to make the most of it. But that does not satisfy the defendant. He does not want the deed, which was all the plaintiff got, but he wants something more; which is, that the plaintiff should account with him for what the plaintiff might have made by the deed, if he had been as diligent as he might have been, or even as most men are, in guarding against loss. That is altogether a different principle from those before spoken of, and is new to us. We do not see how one surety can resist making contribution, by shewing that the other had it in his power to secure both, and did not. No such doctrine is found to have been laid down, and it does not appear to rest upon any reasons of justice or benevolence. The obligation of one surety, to divide with another what he gets from the principal, arises out of their connexion in a common risk. It is said, and every one feels, that all, standing in that relation, ought to make common cause, and that one cannot with a good conscience selfishly provide for himself and leave others to lose. It is his duty to remember his fellow sufferer with himself. Hence, when he can get a counter-security, he ought to take it to both; and, if he take it to himself only, the other has a right to claim it, and equity treats it, as if it were made to both, or

got by a common agent for the benefit of both. But one surety cannot ask another to do more for him than he does for himself. It is a plain violation of the benevolence, that ought to subsist between sureties, for one of them to insist, that he should be relieved from loss, and the whole thrown on another, because the latter did not, when he might, get a security, or an effectual security. In claiming the benefit of the deed the defendant treats the plaintiff as his agent in getting a good security. How, then, can he disavow the agency, when the security turns out not to be effectual. He claims that the deed, though not so expressed, enured to his benefit, on the principle of equality; and yet, at the same time, he would break in on that equality by deducting the value of the negroes from the debt, so as to give him a benefit, while the plaintiff gets none. There seems to be nothing to uphold such a doctrine. The true principle is, that sureties are to fare alike. If one gets a security, it is a security for all. But they must take it in the state, in which they find it. If good for one, it is good for all. What right has the defendant to complain of the *laches* of the plaintiff? They were no greater than his own. The one made no attempt to get a security; and the other made a partial attempt but did not carry it through. It is said, however, that the conduct of the plaintiff may have been to the prejudice of the defendant, as it may have prevented the principal, upon the defendant's application from giving him a security, inasmuch as they had already executed that to the plaintiff, which secured both. That is answered, first, by the fact, that there is no evidence of such an application by the defendant; and, next, that, if there had been such a transaction, that by itself would not help the defendant's case. For upon hearing of the deed to the plaintiff—it being in law for their joint benefit, it would have been as much his duty, as that of the plaintiff, to advise and see to its completion by registration. If he had applied to the plaintiff to

register the deed or let him have it done, and the plaintiff had refused, the defendant might have more cause to complain, not indeed, of a violation of a duty of benevolence on the part of a co-surety merely, but because of the positive wrong of preventing the defendant from perfecting a conveyance, in which he had equitably as much interest as the plaintiff and as much right to control. There seems to be a plain distinction, between wantonly frustrating the wish and effort of the defendant to make their common security effectual, and a mere passive omission to do so on the part of the plaintiff.

Then, it is said the plaintiff was guilty of a fraud in agreeing not to make the deed public by registration. But that is a fraud on the principal's creditors, who claimed against the deed; and not on the defendant, whose claim is under the deed.

Finally, the Court holds, that, as a co-surety, the plaintiff was only bound to act for the defendant, as he did for himself; and that, as the plaintiff derived no benefit from the deed, the defendant cannot; and therefore that the plaintiff was entitled to recover an aliquot part of what he paid, without any deduction on account of the slaves conveyed, or, rather, intended to be conveyed by the deed.

PER CURIAM. Judgment affirmed.

DEN ON DEMISE OF JOHN C. BARNES vs. SPENCER M. MEEDS.

Where one purchases land at an execution sale at a great sacrifice, in consequence of a fraudulent combination between him and the sheriff who conducted the sale, as, by reason of this fraud, he obtained no title, so a *bona fide* purchaser from him, without notice of the fraud and for a valuable consideration, will likewise obtain no title.

Appeal from the Superior Court of Law of Pasquotank County, at the Spring Term, 1848, his Honor Judge SETTLE presiding.

The premises mentioned in the declaration were sold by the Sheriff of Pasquotank, under a *fieri facias* against the present defendant, and were bid off by John J. Grandy, who took the Sheriff's deed and recovered them in an action of ejectment against one Morris, who was at that time in possession under Meeds. The Sheriff went to the premises to execute the writ of possession, and, finding Meeds again in possession, he put him out, and delivered the possession to Grandy's agent. Meeds then applied to the agent to allow him to stay there a short time, until he could get another place; and the agent assented, and the defendant returned into possession. Soon afterwards Grandy conveyed the premises to the lessor of the plaintiff; and he demanded possession from the defendant, and, upon his refusal, brought this suit.

In answer to the foregoing case, the defendant called as a witness the former Sheriff of Pasquotank, at whose sale Grandy purchased. He deposed that he levied the execution on two tracts of land, about half a mile apart, on one of which Meeds resided; and that, after due ad-

vertisement, he offered them separately for sale at the place of Meed's residence, (under a Private Act for that County,) and Grandy became the purchaser of each at fifty cents. The witness further deposed, that the day of sale was very rainy, and that Meeds was from home, and no other person was present but Grandy and himself. And the witness further deposed, that he, the witness, and Grandy and some other persons were bound as sureties for Meeds for other debts, (not in execution,) and that it was their object to make Meeds' property pay his debts, and it had been agreed, if it could not be sold under execution for its value and Grandy should become the purchaser, that he should re-sell it, and, if an advanced price could be got, it should be applied to the debts for which he, the Sheriff, Grandy, and the other persons were bound for Meeds.

The counsel for the defendant moved the Court to instruct the jury, that if they believed that Grandy and the Sheriff combined to make a sale of the defendant's land, so that Grandy could purchase at a great sacrifice, then the pretended purchase of Grandy was void, and the plaintiff could not recover. The Court refused to give the instruction; and, on the contrary, directed the jury, that, if those persons did combine to sacrifice the land, it would not affect the right of the plaintiff in this action, if they believed the lessor of the plaintiff was not a party to the combination and had no notice of it, and was a *bona fide* purchaser for a valuable consideration. The jury found for the plaintiff, and he had judgment; and the defendant appealed.

Iredell, for the plaintiff.
Heath, for the defendant.

RUFFIN, C. J. There was no evidence of any price given by the lessor of the plaintiff to Grandy; much

less, that it was a fair one, so as to make him a meritorious purchaser for a valuable consideration. It is error to leave it to the jury to find a fact, without any evidence tending to establish it; and therefore the judgment would be reversed, if the other and more important part of the instruction were right.

But the Court holds the residue of the instruction to be also erroneous. The testimony of the Sheriff raised a strong suspicion of an illegal conspiracy and injurious practice between him and Grandy, to get the title of the defendant's property vested in Grandy at a great undervalue, for their joint benefit, and to the prejudice of both the creditor and the debtor in the execution. Without leaving the inquiry of fact to the jury, but assuming it to be as alleged by the defendant, and impliedly admitting, that, by reason of the conspiracy and the low price of the land, Grandy got no title by his purchase, his Honor nevertheless held, that Grandy's conveyance to the lessor of the plaintiff gave him a good title, if the latter had no notice of the fraud and paid a fair price. That seems to be against first principles; for he, who has no title, can convey none. A bad title is not made good by the ignorance of the purchaser of its defects, or his want of knowledge of the better title. A purchase of the legal title for value, and without notice of an equity, may prevent the purchaser from being held to be a trustee. But in respect of legal estates the rule is, *caveat emptor;* for the better title never can be destroyed by another's want of knowledge of it.

An attempt was made, in the argument, to assimilate this to a purchase from a fraudulent grantee under *St.* 27 *Eliz.* But the cases are not of the same kind. They are, indeed, opposed to each other. The owner of the land, fraudulently sold, was not a party to the fraud, but the victim of it. Consequently he may aver the fraud and avoid the deed. But a fraudulent grantor is a party to the fraud, and he and all others are bound by his deed

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except subsequent purchasers from him. It has been held also that a purchaser from the fraudulent grantee shall hold; because the object of the act is to protect purchasers, and therefore it enures to the benefit of a purchaser from either the grantor or the grantee, provided he be the first purchaser. For the fraudulent grantee has a title, and consequently can convey; and in so doing he wrongs no one, there being then no second purchaser from the grantor. To make a case under the statute at all like the present, it should appear, that, after a conveyance by the grantor to a second purchaser, a vendor of the first fraudulent grantee would have a good title, merely because he was ignorant of the fraud in his vendor's title and of the second conveyance of the original fraudulent grantor. But there is no such decision, and cannot be; for it would be absurd to suppose, that, after a good title had been derived from either the fraudulent grantor or grantee, the other could in any manner make a good title to a third person. The doctrine laid down at the trial derives, then, no support from the rule respecting conveyances by fraudulent grantees; and it is in itself erroneous in affirming that one, who, by reason of his fraud on the owner, gets no title by the Sheriff's deed, may yet convey a good legal title to another. This defect of title is like all others and must be attended by the like consequences. If, for example, the Sheriff had no valid execution or conveyed without having made a public sale, his alienee would take nothing by the deed, and consequently he could convey no title. So it is in any other instance, in which one person undertakes to convey land, which belongs to another: the grantee gets nothing, and the title of the true owner continues.

Per Curiam. Judgment reversed and *venire de novo*.

TROTMAN H. WARD *vs.* ELIJAH SMITH.

Where in an action of trover for the conversion of a negro, the declaration designates the negro by the name of *John*, he must prove on the trial that the negro converted was named *John*.

Appeal from the Superior Court of Law of Chowan County, at the Spring Term, 1848, his Honor Judge SETTLE presiding.

The plaintiff declared in trover, for the conversion of a negro named John. It appeared, that, on a Saturday night, the defendant delivered to the jailor of Chowan County, at the jail in Edenton, a negro boy, and said he was hired by the plaintiff, and that he was a runaway. The jailor received the boy, put him in jail and kept him there, until Monday morning, when upon the application of the plaintiff, he delivered him to him on his paying his prison fees, two dollars. It was not proved that the name of the negro was John, and there was no evidence that the plaintiff had any interest in any other negro, than the one spoken of by the witness.

The defendant insisted, that the plaintiff could not recover for two reasons: first, because there was no evidence of the conversion of any negro boy; and secondly, because there was no evidence of the conversion of the negro boy John. The presiding Judge charged the jury that there was evidence of a conversion, and, if from the evidence they found, that the defendant so converted a negro boy, and that it was John, belonging to the plaintiff, they should find for him.

Under this charge the jury found a verdict for the plaintiff and from the judgment thereon the defendant appealed.

Heath, for the plaintiff.
Iredell, for the defendant.

NASH, J. It is unnecessary we should express any opinion upon the first objection, as our judgment is founded exclusively on the second. The negro, for the conversion of whom the action is brought, is described in the declaration as negro boy John. Having thus identified him, the plaintiff was bound to show that the negro converted was John. This was necessary to the defendant's safety against another action for the same conversion. The case clearly states, that there was no evidence, that the negro delivered to the jailor by the defendant was named John, or was known by that name. But one witness, and that the jailor, appears to have been examined, and he stated that he did not know the boy's name. The case then proceeds and states, "there was no evidence, that the plaintiff had an interest in any other negro than the one spoken of by the witness." From this statement we gather, that there was no evidence whatever upon that point. Whether, therefore, the plaintiff owned but that one negro, was not proved; according to the case he might have owned fifty. If, however, he had shown affirmatively that he had but one negro, to enable him to recover under his declaration, it was necessary to prove, that *his* name was John. There was no evidence to be left to the jury, "that it was John belonging to the plaintiff," who was converted. His Honor therefore erred in that part of his opinion.

PER CURIAM. Judgment reversed, and *venire de novo* ordered.

SPENCER M. MEEDS vs. JOB CARVER.

The lawfulness of an arrest does not depend upon what an officer says, but upon the authority he has to make the arrest.

A deputy of a sheriff is so far bound by precepts in the hands of his principal, that neither he nor his principal is liable to an action for false imprisonment, in detaining a man in prison, arrested upon one process and discharged on that, when another valid process is in the hands of the principal, on which he was subject to arrest; and this, although neither the deputy nor the person arrested knew that the sheriff had such process.

The cases of the *State* v. *Kirby*, 2 Ired. 201, and *State* v. *Elrod*, 6 Ired. 250, cited and approved.

Appeal from the Superior Court of Law of Camden County, at the Spring Term, 1848, his Honor Judge SETTLE presiding.

The action is trespass, for false imprisonment in the gaol of Pasquotank in July 1844. The defendant pleaded, in justification, two writs of *capias ad satisfaciendum*, directed to him, as Sheriff of that County. On the trial the defendant gave in evidence the two *ca. sa's.* One of them was issued by a Justice of the Peace, and commanded the Sheriff to take the body of the plaintiff and two other persons, and "them safely keep, so that you have them before some Justice of the Peace for said County, to show cause, if any they have, why they will not satisfy a judgment, which lately on the 1st day of May 1844, before Sion Culpepper, Esquire. one of the Justices of the Peace for said County, Joseph H. Pool recovered against them for the sum of thirty dollars with interest thereon from the 25th of August, 1842, and also the sum of twelve shillings for costs, besides your fees. Herein fail not and make due return. Witness, &c. July 2nd, 1844." The other was a writ of *ca sa.* in due form, issued from the County Court of Pasquotank against the plaintiff and two others,

on a judgment recovered in that Court against them, by Joseph Jones for $8, and also $8 45 for costs adjudged. It bore teste the 1st Monday of June 1844, and was returnable to the next term of the Court, to be held on the 1st Monday of September, 1844, and was issued June 17th, 1844. On the part of the defendant evidence was given that Jones' execution was delivered to him on the 20th day of June, and that a man named John J. Grandy, who claimed an interest in the other judgment, delivered the other process to one Hunter, a deputy of the defendant, on the day it bears date, and that on that or the next day, Hunter arrested the plaintiff and committed him to prison.

The said Grandy was then called as a witness, and deposed, that, in a few days after the plaintiff was arrested, he heard of it, and went to the gaol and informed the plaintiff and one Burgess, who kept the gaol under the defendant, that the plaintiff might be discharged on the payment of the sheriff's fees. That on the next day he called again at the prison, and found the plaintiff still confined, and was informed that the plaintiff was about giving bond for his appearance at Court under the insolvent debtor's act, and had procured one person to agree to be his surety and was looking out for another; and that the witness then directed the gaoler to take the bond of one surety, as he did not care for a second.

A witness was then called for the plaintiff, who stated that the witness Grandy directed the gaoler to discharge the plaintiff from imprisonment upon payment of the fees, and that he, the witness, thereupon offered to pay them for the plaintiff, in order that he might be discharged; but that the gaoler refused to turn him out, until he could see the sheriff, because he said he had been so instructed by the defendant: And that afterwards the witness and others became sureties for the defendant's appearance under the other execution above mentioned, and the plaintiff was let out of prison.

On the part of the plaintiff evidence was further given that the *ca. sa.* in favor of Jones was returned to the next Court in the name of the defendant by his deputy E. H. Hunter "executed on Spencer S. Meeds and bond filed herewith;" and that at Court the defendant understood that this was a *ca. sa.* issued on a judgment rendered on a bond taken under a former *ca. sa.* and thereupon altered the return by striking out the first and entering "not taken."

The counsel for the plaintiff moved the Court to instruct the jury, that the process in the name of Pool was void and did not authorise the arrest of the plaintiff; or if that were not so, that it was illegal to detain the prisoner on it, after the creditor had directed him to be discharged upon the payment of fees, and the offer to pay them. The Court held, that the process was valid as a *ca. sa.* and authorised the arrest and detention of the plaintiff. But the Court further informed the jury, that, whether that were true or not, the other *ca. sa.* in favor of Jones, though in the hands of the defendant and not in those of his deputy, Hunter, who made the arrest, or known to him or the gaoler, yet justified the defendant in this action for the arrest and detention of the plaintiff, until he gave the bond for his appearance, when he was discharged from custody. There was a verdict for the defendant, and after judgment the plaintiff appealed.

Heath, for the plaintiff.
Iredell, for the defendant.

RUFFIN, C. J. The judgment must be affirmed, without reference to the point of the validity or invalidity of the Justice's execution; for, admitting it to be void, yet the other was a full authority for all that was done, as the validity of that is not questioned. As to it, the objections are, that the plaintiff was not informed that he was

arrested on it, and in fact, that he was not, for it was in the hands of the defendant himself and was not then known to the plaintiff, nor to Hunter, who made the arrest. But that is not at all material; for if the officer expressly declare that he arrests under an illegal precept and on that only, yet he is not guilty of false imprisonment, if he had, at the time, a legal one; for the lawfulness of the arrest does not depend on what he says, but what he has. *State* v. *Kirby*, 2 Ired. 201. *State* v. *Elrod*, 6 Ired. 250. Undoubtedly, if the gaoler had discharged the plaintiff, the sheriff would have been liable for an escape on Jones' execution; for the gaoler is the sheriff's deputy, and bound to take notice of the writs in the hands of his superior, and a detention by the gaoler is justified, if one by the sheriff himself would have been by the same process. No doubt the *ca. sa.* from the County Court caused the defendant to order the gaoler not to let out the plaintiff without notice to him, as he knew it was his duty to detain him until he paid that debt also. It would have been more creditable to the defendant to have left the writ with the gaoler, so that the plaintiff might have had his discharge in the defendant's absence, upon payment or giving bond. But he was not bound to do so: and, in his own hands, it justified the defendant's servants in arresting and detaining the plaintiff. The subsequent alteration of the return, though very improper, can make no difference; for it was made after the plaintiff was let at large, and cannot affect the process, as an authority for his arrest and detention, while he was in prison. To that purpose it was sufficient, whether the sheriff made a true or false return on it, or none at all.

PER CURIAM. Judgment affirmed.

MOSES EDWARDS *vs.* HAMPTON SULLIVAN, ADM'R. &c.

To impeach the credibility of a witness, by proving that he swore differently, as to a particular fact, on a former trial, it is not necessary that the impeaching witness should be able to state all that the impeached witness then deposed to: it is sufficient, if he is able to prove the repugnancy, as to the particular fact, with regard to which it is alleged to exist.

Proof of the hand-writing of a subscribing witness to a deed, who resides out of the State, is sufficient proof of the execution of the deed

Where a witness has been examined on one side, it is not competent for the opposite party to introduce evidence to shew his bias, feeling or partiality towards the person introducing him, unless the witness has been previously questioned himself as to that point.

The cases of *Ingram* v. *Watkins*, 1 Dev. and Bat. 442, *Selby* v. *Clark*, 4 Hawks 265, *Bethel* v. *Moore*, 2 Dev. and Bat. 311, and *State* v. *Patterson*, 2 Ired. 346, cited and approved.

Appeal from the Superior Court of Law of Cumberland County, at the Spring Term, 1848, his Honor Judge BAILEY presiding.

This was an action of debt upon a bond for the payment of seven hundred and fifty dollars, dated in July 1843; to which the defendant pleaded the general issue. It was commenced in the County Court and carried by appeal to the Superior Court in which it was tried at Cumberland on the last circuit. In support of the affirmative of the issue, the plaintiff called the subscribing witness; who testified, that, on a certain occasion, he was riding along the public road in Cumberland County, and saw the plaintiff and defendant seated on a log by the road side, that the plaintiff, on seeing him, remarked let us have a witness, to which the defendant assented, and, after acknowledging the execution of the bond in question, handed the witness a pen and ink, with which he subscribed his name to the instrument as a witness. He

was then asked by the defendant's counsel, whether his testimony then was not different from what it was in the County Court, to which he replied that it was not. He stated further, on his cross-examination, that the defendant, Sullivan, said that the bond was given for the plaintiff's interest in his mother's estate, notes and other things, and that he now owned all that Edwards, the plaintiff, was worth and would soon own him. The witness stated further, that, at the time, there were many papers lying on the ground near the parties. Much conflicting testimony was then given on both sides, relative to the hand writing of the defendant Sullivan, and the character of the witness Bryant.

On the part of the defendant one Richardson was then introduced, to prove that the witness Bryant had given testimony on the trial in the County Court, different from what he gave on this trial, but he was objected to, because he said that he could not state the substance of all Bryant's testimony on the former trial. The Court nevertheless permitted him to state that Bryant swore on that trial, that Edwards and Sullivan were seated near the root of a pine, and had a jug of whiskey between them, whereas on this trial, he had stated, that they were seated on a log, and was silent as to the jug of whiskey.

The defendant next offered in evidence a deed from Edwards to him, Sullivan, purporting to have been executed in May 1842, and to convey, in consideration of the sum of five dollars paid, all Edwards' interest in the estates of both his father and mother. The deed was offered for the purpose of showing, that, at the date of the bond sued upon, Edwards was insolvent, and also for the purpose of contradicting and discrediting the witness Bryant. And the defendant offered further to establish the deed, by proving the hand writing of the subscribing witness thereto, who lived out of the State. The plaintiff objected to the introduction of the deed in evidence at all, and he further objected to its being received upon

proof of the hand writing of the subscribing witness, but the Court over-ruled both objections and received the evidence. The defendant then proposed to prove by one Thomas, that he, the witness, on a certain occasion pending this suit, applied to the witness Bryant for some money which Bryant owed him, and that Bryant said, in reply to the application, that he had no money there, but that he had a good many witness tickets in this case, and if the suit went as he expected, they would be fat tickets for him. The testimony was objected to by the plaintiff, for the reason, that, if it were introduced to impeach the witness Bryant, it was incompetent, because he had not been previously asked, whether he had made such a statement to the witness, Thomas, but it was admitted by the Court. A verdict was returned for the defendant, and a new trial being moved for and over-ruled, and judgment given, the plaintiff appealed.

D. Reid, for the plaintiff.
Husted and *W. Winslow*, for the defendant.

Battle, J. It seems to us that there is no difficulty in any of the objections to testimony, made by the plaintiff, except the last. The first objection is directly and fully answered by the case of *Ingram* v. *Watkins*, 1 Dev. & Bat. Rep. 442, where it was held, that to impeach the credibility of a witness, by proving that he swore differently as to a particular fact on a former trial, it is not necessary that the impeaching witness should be able to state all that the impeached witness then deposed. It is sufficient, if he is able to prove the repugnancy as to the particular fact, with regard to which it is alleged to exist.

The deed from Edwards to Sullivan was certainly competent for the purpose for which it was offered. The witness Bryant had stated, that, at the time he subscribed the bond in question as a witness, Sullivan told him that it was for the purchase of all the interest of Ed-

wards in his mother's estate. The deed then was material to show that Edwards had, at that time, no such interest to be the subject of a contract, and also to show the falsity of the witness Bryant or the frailty of his memory. The cases of *Selby* v. *Clark*, 4 Hawks Rep. 265, and *Bethel* v. *Moore*, 2 Dev. and Bat. Rep. 311, without adverting to others, show that the proof of the hand writing of the subscribing witness who lived out of the State, was sufficient proof of the deed to justify its introduction. The last objection raises a question of much practical importance, relative to the manner, in which a witness may be impeached for a supposed bias in favour of one of the parties to a suit. The question is, whether, after a witness has given his testimony for the party who calls him, another witness may be asked by the adverse party to state, whether he has not heard the first witness make a statement or declaration showing his bias, feeling or partiality in favour of the party, who has examined him, without having first asked such witness whether he has made such statement or declaration. We think that this question must be answered in the negative, both upon principle and upon the authority of adjudged cases. The only legitimate object of a trial is the ascertainment of the truth of the matter in issue between the litigating parties, and all the rules which are or may be established for conducting its proceedings, particularly for the manner of examining, cross-examining, attacking and supporting witnesses, ought to have this great end in view. Among these rules, there is scarcely one, which requires to be settled with more care, than that which is intended to regulate the mode by which the credibility of a witness, either while under examination or after his examination has closed, may be impeached. It is undoubtedly necessary and proper, that the adverse party should have every fair opportunity, by cross-examination or otherwise, of testing the fairness and impartiality of a witness offered against him, as well as of enquiring into the ex-

tent and accuracy of his memory, his opportunities of observation and the respectability of his character. But such witness ought, at the same time, in justice both to himself and to the party who calls him, to be protected from having his testimony and his character misrepresented and misunderstood by the introduction of evidence on a sudden and by surprise, which, from its nature he could not be expected to come prepared to meet, and which, had he been apprised of it, he could easily and satisfactorily have explained. Of such a character is the evidence, which is offered for the purpose of showing by the statement or declaration of a witness made previous to the trial, that he has an undue leaning towards the party who has called him. This kind of testimony partakes in many respects of the character of collateral evidence, though from its bearing directly upon the cause in affecting the credibility of the witness, it is exempted from the operation of the rules relative to testimony purely collateral. But being in many respects collateral, neither the witness, nor the party who calls him, can be expected to be prepared to meet and explain it, and therefore ought not to be required to do so unless the attention of the witness is drawn to it by a question put directly for that purpose. Accordingly, we find it stated by all the Judges of England on the Queen's trial, 2 *Brod. and Bing.* 314, (6 Eng C. L. Rep. 130,) that it is the usual practice of the Courts below, and a practice to which there is no exception, that if it be intended to bring the credit of a witness into question by proof of any thing that he may have said or declared, touching the cause, the witness is first asked upon cross-examination, whether or no, he has said or declared that which is intended to be proved. The same question was decided by this Court in the case of the *State* v. *Patterson*, 2 Ired. Rep. 346. In that case the defendant's counsel proposed to introduce a witness to prove that Jacob and Daniel Cluck, who had been examined for the State, had told

him, that the prosecutor had paid them for coming from Tennessee to this State as witnesses. These witnesses had been previously asked, on cross-examination, whether the prosecutor had not paid them, but they had not been asked whether they had so stated to the defendant's witness. The testimony was objected to and rejected by the Court. After his conviction, the rejection of this testimony formed one of the grounds, on which the defendant based a motion for a new trial. But the motion was over-ruled in the Court below, and the decision was sustained on an appeal to this Court. Judge GASTON, in delivering the opinion of the Court, after remarking upon the character of the testimony and the purpose for which it was properly admissible, to-wit, to impeach the credibility of the witness, compared it to the mode of attacking his credibility by proving inconsistent declarations as to his temper, disposition, or conduct, in relation to the cause or the parties, and concluded by pronouncing, in effect, that the two modes were similar, if not identical, in character, and therefore subject to the same rule. To the same effect are the remarks made by the CHIEF JUSTICE in delivering the opinion of the Court in *Pipkin* v. *Bond*, 5 Ired. Eq. 107. But it may be objected, that, if the adverse party fail, from inadvertence or other cause, to put the preliminary question to the witness upon his cross-examination, he will loose the opportunity of introducing testimony, important in ascertaining the truthfulness of the witness. To this it may be replied, that the Court may, and in a proper case undoubtedly will, permit him to recall the witness for the purpose of asking the necessary question. And if it be further objected, that the witness may have left the Court, upon the supposition that his attendance is no longer necessary, so that he cannot be recalled, then it may be answered, that it is much better for the purposes of justice, that the oversight of the party should operate to the exclusion of the

impeaching testimony, than that the witness, who is proposed to be impeached, and the party who calls him, should be subjected to the great injustice, which would often be done, if evidence of this sort could be adduced, without any opportunity for explanation being afforded to such witness or party. Indeed if there were reason to believe, that the witness had left the Court by collusion with the party, who has introduced him, then the presiding Judge might, and no doubt would, dispense with the preliminary question. In the case before us, the testimony, which we must suppose was offered by the defendant to impeach the credibility of the witness, Bryant, by showing his leaning in favour of the plaintiff, was received by the Court, after objection, without requiring the previous question to be put to the witness, which we think was erroneous.

For this error the judgment must be reversed and a *venire de novo* awarded.

Per Curiam. Judgment reversed and *venire de novo*.

BENJAMIN SHERROD *vs.* BRYAN BENNETT & AL.

To take a case out of the statute of limitations, pleaded in an action of assumpsit, the promise or acknowledgment must be an express promise to pay a particular sum either absolutely or conditionally; or such an admission of facts, as clearly shews, out of the party's own mouth, that a certain balance is due, from which the law can imply an obligation and promise to pay; or that the parties are yet to account and are willing to account and pay the balance then ascertained.

The cases of *Peebles* v. *Mason*, 2 Dev. 367, *Smallwood* v. *Smallwood*, 2 Dev. and Bat. 336, and *Rainey* v. *Link*, 3 Ired. 376, cited and approved.

Appeal from the Superior Court of Law of Martin County, at the Spring Term, 1848, his Honor Judge CALDWELL presiding.

This was an action of assumpsit upon a *quantum meruit*, for work and labor done by the plaintiff for the testator of the defendants. Pleas, the general issue, and the statute of limitations.

It appeared upon the trial, that the plaintiff had lived with the defendants' testator, serving him in the capacity of a manager or overseer, from January 1828, until January 1844. The suit was commenced in November 1846, and the plaintiff, for the purpose of repelling the bar of the statute of limitations, called several witnesses to prove acknowledgements of the debt, and promises to pay it by the testator within less than three years before the writ was issued. One of these witnesses testified that a year or two before the testators' death, which occurred in August 1846, the testator said to him, that the plaintiff had lived with him a good long while, and he intended he should be paid for his services. Another witness stated, that, just before the plaintiff left the employment of the testator, the latter told the witness, that the plain-

tiff's wages were not limited, and he intended to make him compensation at his, the testator's death. A third witness testified that the testator told him, in the year 1844, or 1845, that the plaintiff had not been paid for his services, but he intended to pay him, and he hoped, at the day of his death, the plaintiff would be satisfied. And to a fourth witness he said, the winter before his death, that the plaintiff had lived with him a long time, had done him more service than he could have expected from him, and if he lived, the plaintiff should be paid. The plaintiff was not present on any of the occations spoken of by the witnesses.

The defendants insisted that nothing was proved, which could prevent the operation of the statute of limitations. The Court charged the jury, that to remove the bar created by the statute, it must appear that the testator expressly promised to pay the plaintiff for his services, or made such an explicit acknowledgment of a subsisting debt, that a promise to pay might be implied from it; that if the jury believed the witnesses, there was proof, at least, of such an acknowledgment of a subsisting debt, from which a promise to pay might be implied. The jury, under this charge, returned a verdict for the plaintiff for the amount of his whole claim. A new trial was moved for, because of mis-direction by the Court, which was refused, and a judgment rendered, from which the defendants appealed.

Biggs, for the plaintiff.
Rodman, for the defendants.

Battle, J. We cannot affirm the judgment in this case, without violating those salutary principles, which the later decisions of this Court have established upon this subject. In *Peebles* v. *Mason*, 2 Dev. Rep. 367, it is said by the Court, that, to take a case out of the operation of the statute of limitations, "the promise or

acknowledgment must be an express promise to pay a particular sum either absolutely or conditionally; or such an admission of facts, as clearly shows, out of the party's own mouth, that a certain balance is due, from which the law can imply an obligation and promise to pay; or that the parties are yet to account, and are willing to account and pay the balance then ascertained." The principles thus clearly and explicitly stated have been re-asserted and sustained by the subsequent cases of *Smallwood* v. *Smallwood*, 2 Dev. and Bat. 330, *Rainey* v. *Link*, 3 Ired. Rep. 376, and perhaps by others. In the case now before us, the testimony does not show that the testator acknowledged that any particular sum was due the plaintiff; much less that he promised to pay it. It contains no admissions of facts, so as to show out of the testator's own mouth, that a certain balance was due; and there is not the slightest intimation that there was an account between the parties, which the testator was willing to settle, and to pay the balance. His declarations to every witness, were vague and indefinite; and some of them are of such a character as to leave us somewhat in doubt, whether he considered the plaintiff as having claims upon his bounty or his justice. To permit such expressions to repel the bar of the statute, would be to let in all the evils against which it was intended to provide. The cases cited by the plaintiff's counsel are decisions of our sister States, and however high may be the respect, which we entertain for the Courts, which made them, we cannot permit them to over-rule, or even to modify, those of our own Court. The judgment must therefore be reversed, and a *venire de novo* awarded.

PER CURIAM. Judgment reversed and a *venire de novo*.

JAMES R. LEMIT *vs.* ARTHUR S. MOORING.

To render a sheriff liable to an amercement for making a false return, it must appear that the return is false in point of fact, and not false merely as importing, from facts truly stated, a wrong legal conclusion.

The cases of *Lemit* v. *Freeman*, 7 Ire. 317, and *Hauser* v. *Hampton*, 7 Ire. 333, cited and approved.

Appeal from the Superior Court of Law of Washington County, at the Spring Term, 1848, his Honor Judge SETTLE presiding.

This is an action of debt to recover $500, as a penalty incurred by the defendant for making a false return of a writ of *capias ad respondendum*, returnable to the Superior Court of Washington, in which Joseph Long was plaintiff, and Joshua Long defendant, which was delivered to the defendant, then Sheriff of Martin County. Plea, *nil debet*.

The return was in these words: "This writ came to hand on the 22nd of Febuary, 1847, during the term of Martin Superior Court of Law, and from that day until Friday, inclusive, of that Court, I and my deputies were engaged, so that I could not serve said writ on the defendant, who lives fifteen miles from the Court House at Williamston, my place of residence, and during all which time I did not see the defendant."

On the part of the plaintiff evidence was given, that Martin was a large and populous County, and that the defendant in the writ, Joshua Long, lived about 15 miles from the Court House and in a part of the County in which it would be difficult for the Sheriff to get a deputy, but that among the number of persons attending Martin Court that week, it was highly probable that he might

have procured some one to execute the writ as a deputy. It was agreed, that Washington Superior Court began on Monday, the 8th of March, 1847.

The Court instructed the jury, that the defendant was bound to procure and have at all times, deputies in number sufficient, with himself, to meet the exigencies of his office; and if they believed that the defendant could have executed the writ himself, or could have procured any one to execute it, by the use of reasonable and proper diligence, it was his duty to do so, and failing to do so, the return would be false, and he would be liable in this action, notwithstanding the defendant and the deputies which he had, were engaged in attending the Superior Court of Martin, from the time the writ came to his hands until it was too late to execute it.

There was a verdict for the plaintiff, and the defendant moved to set it aside, and for a *venire de novo*, for error in the instructions to the jury. But the Court refused the motion and gave judgment, and the defendant appealed.

Heath, for the plaintiff.
Biggs, for the defendant.

RUFFIN, C. J. The Act of Assembly imposes two duties on sheriffs in respect to process coming to their hands. The one is, that they shall make *due* return of it under penalty, for not making such return, of being amerced $100 by the Court, on motion, for the benefit of the person grieved. The other is, that they shall make *true* return; under a penalty for every *false* return of $500, to be recovered by action of debt, one moiety to the party grieved, and the other to him who will sue for the penalty. *Rev. St.* c. 109, s. 18. Upon the construction of the Act, the opinion of the Court differs from that entertained by his Honor, who presided at the trial. The return may not be a due return perhaps; and thus it may fall within

the first branch of the statute, for any thing to be said to the contrary in this case. But we think very clearly, that it is not such a false return as is meant in the statute, so as to make the sheriff incur the heavy penalty of $500. To have that effect it must be false in point of fact, and not false merely as importing, from facts truly stated, a wrong legal conclusion. The Act was designed to punish sheriffs for putting on process deceptive returns; such as mislead the parties in point of fact and baffle them in the execution of their process. It may be true in this case, that the sheriff would be liable to the action of the plaintiff in the writ for not executing it, or for an amercement for not making a proper and legal return. But it does not appear that any part of the return, as made, is untrue as to the matter of fact. No evidence was given of the number of the defendant's deputies, or that he or any one of his deputies could, without a dereliction of duties previously incurred to the Court, have gone to serve this writ during term time. Without such evidence there is a presumption in favour of the return, as to the truth of the facts stated in it; and therefore it is to be assumed, that the writ came to hand, as stated, that the term of the Court began and continued, and the residence of the defendant in that suit was, and the engagements of this defendant and his deputies were, also as stated. If so, the return, though it may be legally insufficient, is substantially true in fact, as what follows—"so that I could not serve this writ on the defendant"—is barely a conclusion or inference from the preceding facts, and purports only to be so, and could not deceive the plaintiff as to the acts of the sheriff or with respect to his recourse on him. The counsel for the plaintiff supposed the case to fall within those of *Lemit* v. *Freeman*, 7 Ired 317, and *Hauser* v. *Hampton*, 7 Ired. 333. But they are not at all alike. The returns in both of those cases were directly false in point of fact. In the latter case there was a return of *non est inventus*, when

the sheriff or his deputy, which is all one, had actually been in conversation with the defendant in his county. And in the former, without returning the day of receiving the writ, and concluding from it, that "so the writ was not in time to be served," the sheriff took upon himself to state the fact directly and positively, "too late to execute," when in truth the writ was in his hands seventeen days, as proved on the trial. Both returns were therefore proved to be false, and the plaintiff was entitled to recover. But here it is quite otherwise; for, as far as shown on the trial, not a statement in the return, purporting to be a statement of a fact, was in the least untrue.

PER CURIAM. Judgment reversed and *venire de novo*

THE STATE *vs.* MINCHEE WHITFIELD.

An indictment for forcible entry is good at common law, when it charges "that the defendant, unlawfully and with strong hand, did break and enter into a certain house of J. D., he the said J. D. being then and there in peaceable and quiet possession of the same."

The cases of *State* v. *Pollok*, 4 Ire. 303, and *State* v. *Tolever*, 5 Ire. 452, cited and approved.

Appeal from the Superior Court of Law of Person County, at the Spring Term, 1848, his Honor Judge PEARSON presiding.

The defendant was convicted upon an indictment, which charged, that he and another unlawfully, forcibly, injuriously, and with strong hand, did break and enter into a certain kitchen of J. D, he the said J. D. being then and there in peaceable and quiet possession of the same, and, having so as aforesaid broken and entered into the said kitchen, then and there being in the actual possession of the said J. D., unlawfully, forcibly, injuriously, and with strong hand, did then and there continue and remain for one day, the said J. D. being then and there actually present and forbidding them so to do. The indictment concluded at common law; and, on motion of the defendants counsel, the judgment was arrested and an appeal was taken for the State.

Attorney General, for the State.
E. G. Reade, for the defendants.

Ruffin, C. J. The reason for the motion in arrest of judgment is not stated in the record, and the Court does not perceive any.

Since *Bathurst's case*, cited in *Storr's case*, 3 Bur. 1698, and *Wilson's case*, 8 T. R. 357, it seems to have been considered settled, that for a violent entry into the possession of the house of another, laid to be done *manu forti*, an indictment will lie at common law. The latter was a solemn decision on demurrer. In this State the doctrine has been adopted. In the *State* v. *Fort and Gause*, 4 Dev. and Bat. 192, it was, indeed, held, that the indictment was not good, which charged only that the defendants broke the window of the prosecutor's house, though laid *manu forti*; because the facts themselves only amounted to a civil trespass, and not to a breach of the peace, nor tended directly to it nor to the terror of the owner, as they might do if the owner were present. But it was distinctly laid down, that "the violent taking or withholding of the possession of a man's house is a public offence," and

that "strong hand" is technically appropriate to designate the degree of violence which renders it so. In the language of Lord KENYON in *Wilson's case*, "God forbid that such an act should not be an indictable offence. The peace of the whole country would be endangered, if it were not so." To the decision of this Court, just cited, are to be added the subsequent cases of *Pollok*, 4 Ired. 303, and *Tolever*, 5 Ired. 452; which are in point.

After those cases we cannot suppose the decision of the Superior Court was made upon the ground, that the act laid in the indictment is not an offence, if done by a stranger and mere wrong-doer. Indeed, the counsel here takes a different objection, and informs us, that upon that, the judgment was arrested by his Honor. It is, that it does not appear upon the indictment, that the defendants were strangers and wrong-doers; and therefore they may have been the owners of the house and had the right to enter as they did. The objection is founded on the passages in 1 *Hawk. P. C. B.* 1, *c.* 28, *s.* 1, and 4 *Bl. Com.* 148, that at common law one disseised has a right to enter into his lands by force, if he can do so without commi ting a battery on the person in possession. It is not necessary to say here, how that is, but we may leave it to be decided when the question shall arise, as was done in *Rex* v. *Wilson*. For, admitting that doctrine, the indictment is sufficient without a direct negative averment that the defendants had no title to the lands. In general, negative averments are not necessary in pleading, unless to meet some exception or proviso in a statute, 1 *Chit. C. L.* 283; and *Wilson's case* is a direct authority, that the indictment is good in this case without it. There the indictment charged that the defendants "*unlawfully and injuriously, and with strong hand*, entered into a certain mill and lands and houses, *being in the possession of M. L. &c.*" without any other reference to the defendant's right; and the Court said, when speaking of the passage in *Hawkins*, that, it appearing by

the indictment, that the defendants *unlawfully* entered, the Court could not intend, that they had any title. If they had, and that would prevent their entry upon the prosecutor's possession from being an offence, it was matter of defence upon evidence at the trial, and, as the case comes here, we must presume they showed no title; otherwise they would have brought up the question in a different form. It was erroneous, therefore, to arrest the judgment; and this must be certified to the Superior Court, that sentence may be given on the verdict.

PER CURIAM. Ordered accordingly.

LUCAS M. SUTLIFF vs. DAVID LUNSFORD

In cases brought to the Supreme Court, when the error assigned is in admitting or rejecting evidence, the exception must set out the evidence itself, which was improperly admitted, or offered and improperly rejected.

Appeal from the Superior Court of Law of Johnston County, at the Spring Term, 1848, his Honor Judge CALDWELL presiding.

This is an action of slander, in which the words laid in the declaration are "he has forged my name to a note." Plea—Not guilty.

The case states that, on the trial, a witness for the plaintiff gave evidence, that in a conversation between the witness and the defendant, respecting the plaintiff, the defendant said either "he has forged my name to a note," or, "he has forged my name on a note, and has gone to the South and I believe will not come back;" but whether it was the one expression or the other, the witness was unable to say.

The case further states, that the defence was, that the defendant had been innocently led to believe, that the plaintiff had written the defendant's name as an endorser of a note by one William Moody, and that he spoke the words while under a mistake in that respect. And in order to sustain that defence a witness was called, who produced the note alluded to, and it appeared to have been made by Moody to a person, who endorsed it to the plaintiff, and it had on the back of it in writing the words, "Wm. Moody, David Lunsford's overseer." And the witness testified, that the words, "David Lunsford's overseer," were in the hand-writing of the plaintiff; and that, "soon after the endorsement to him, the plaintiff, then about going North, placed the note in the hands of the witness, a constable, for collection. And the witness further deposed, that, seeing the name of the defendant on the note, and not being able to read the word "overseer," he took out a warrant against Moody as maker, and Lunsford as endorser, and went to Lunsford's and served it on both of them; and that he then showed the note to the defendant, who could read writing, but was, at the time, very sick and in bed. The counsel for the defendant then proposed "to prove by the witness the conversation that took place between the witness and the defendant at that time," which was opposed on the part of the plaintiff, and rejected by the Court.

The jury returned a verdict for the plaintiff, with $500 damages; and the defendant moved for a *venire de*

novo upon the ground, that the Court rejected proper evidence; and, after a refusal and judgment, he appealed.

Miller, *J. H. Bryan* and *W. H. Haywood*, for the plaintiff.

B. F. Moore, *Busbee* and *G. W. Haywood*, for the defendant.

RUFFIN, C. J. The Court is under the necessity, though reluctantly, of affirming the judgment.

It is easy to conceive, that the constable may have given to the defendant, who was then sick a bed, and might not have read the paper, or been in a condition to judge for himself, such information as to the tenor of the endorsement and the hand-writing, as would leave no doubt on the mind of the defendant, that the words were written by the plaintiff, and purported to be an assignment of the note by the defendant to the plaintiff. That probability is rendered quite strong by the circumstance that the witness deposed, that he thought so at the time and took out the warrant accordingly. If, then, the defendant, under those circumstances, honestly believed so from the declarations of the plaintiff's agent, and, soon afterwards, before he was better informed, or had the opportunity of enquiring into the truth from the plaintiff—then out of the State—he spoke the slanderous words, he would certainly be less culpable than if he had framed the tale of his own invention, or even had received his impression from a source, apparently not entitled to so much confidence. But, admitting all this, yet the judgment must stand, as the Court cannot proceed on probabilities of this sort, and assume, because the testimony of the witness might, that, therefore, it would, have been of that character. On the contrary the presumption of law is favourable to the judgment, that it is right, until the contrary appear; and it is incumbent on the appellant to show affirmatively, that

there is error. To do that, it is not sufficient to state in the exception, that the defendant offered to prove "the conversation that took place between the witness and the defendant at that time;" but it is obviously indispensable to set out what the conversation was, which it is alleged, the Court erred in rejecting. Without putting down the conversation it cannot be seen that it was competent or relevant, or that a prejudice could have arisen to the defendant by excluding it. In other words, when the error assigned is in admitting or rejecting evidence, the exception must set out the evidence itself which was improperly admitted, or offered and improperly rejected.

Another error was urged in the argument, namely, that the plaintiff's evidence did not support the declaration, because the latter alleges substantially a charge of forging a note purporting to be made by the defendant, while the evidence leaves it uncertain, whether the charge was not one of forging an endorsement of a note by the defendant: which is a different forgery. But, for similar reasons, the Court cannot sustain this objection. It was not raised on the trial. The exception is exclusively to ruling out the evidence. The Court cannot know but that much other evidence was given, as to the speaking of the words, and must presume there was, if necessary to support the verdict. It has been frequently decided, that it is not necessary to support the verdict by showing a sufficient case made on the trial to justify it; and that the judgment must stand, in respect of matters *dehors* the record, unless by exception it appear, that the Court erred in point of law in receiving or rejecting evidence, or giving or refusing some direction to the jury.

PER CURIAM. Judgment affirmed.

MARTIN WOOLARD'S EXR'S. *vs.* RANSON WOOLARD & AL.

A case was brought from the County to the Superior Court by *certiorari*. After the trial of the issues in the Superior Court, the appellant's sureties at the same term suggested his death, but the Court, notwithstanding, gave judgment against them for the costs, the verdict having been against their principal. *Held* that the judgment was right, *first*, because the sureties, not being parties to the suit, had no right to make the suggestion; *secondly*, because, as the issues had just been tried, it must be intended, that the death had taken place during the term.

A separate judgment may be rendered against the sureties on an appeal bond, or the judgment may be against them jointly with their principal.

Appeal from the Superior Court of Law of Pitt County, at the Spring Term, 1848, his Honor Judge CALDWELL presiding.

This was an issue of *devisavit vel non*, made up and tried in the County Court, where a verdict was found in favour of the propounders of the will. It was afterwards carried by the caveator, Ransom Woolard, to the Superior Court by a writ *certiorari*, upon his entering into bond with Thomas Latham, and David P. Perry as his sureties. In the Superior Court, the issue came on to be tried at Pitt, on the last circuit, when the jury, found a verdict establishing the will. Immediately after the entry of the verdict, upon the record, appears the following: "Death of Ransom Woolard, suggested by Thomas Latham and D. P. Perry. On motion judgment against Thomas Latham and D. P. Perry, obligors in the *certiorari* bond, for the costs to be taxed by the Clerk, from which judgment Thomas Latham, and D. P. Perry pray an appeal to the Supreme Court which is granted." Then follows the usual order for certifying the probate of the will to the County Court, &c.

Biggs, for the plaintiffs.
Stanly and *J. H. Bryan*, for the defendants.

BATTLE, J. We cannot discover any error in the judgment rendered against the defendants Latham and Perry. One of their objections to it is, that their principal was dead at the time when the judgment was given, and that it could not regularly be entered up *instanter* upon the appeal bond, without making his personal representative a party. There are two decisive answers to this objection. The first is, that we have no judicial knowledge that the principal was dead. His sureties were no parties to the suit, and had therefore no right to suggest his death, and the entry of their suggestion on the record, is a mere nullity. But if this were not so, and the death of the principal were properly brought to our notice, we are bound to assume that he died after the commencement of the term at which the issue was tried, and when the suggestion of his death was made. Upon no other supposition can the proceeding of the Court in trying the issue, and ordering the certificate of the probate to be sent to the County Court, be upheld; for if the caveator died before the commencement of the term, the verdict and judgment were rendered against a dead man and therefore erroneous, which we are not to presume. Another objection to the judgment is, that supposing their principal died after the commencement of the term, judgment ought to have been rendered against him as well as against the sureties upon the appeal bound. The prevailing party may pursue that course if he chooses, but is not bound to do so. He may take a judgment against the principal upon his liability as a party to the suit, and then another and a separate judgment against the sureties on the appeal bond. If he choose to pursue the latter course, the sureties have thereby no greater burthen

thrown upon them, and therefore have no right to complain. The judgment must be affiirmed.

PER CURIAM. Jndgment affirmed.

THE STATE *vs.* GEORGE, A SLAVE.

Where evidence of inconsistent statements of a witness is introduced by the adverse party, it is proper to permit the party, who called the witness, to prove other statements conforming to the testimony given on the trial. And the witness attacked may himself be examined on that point. The cases of *Johnson* v. *Patterson*, 2 Hawks 183, *State* v. *Twitty*, 2 Hawks 449, *Smith* v. *Smith*, 8 Ire. 29, and *State* v. *King*, 5 Ire. 203, cited and approved.

Appeal from the Superior Court of Law of Person County, at the Spring Term, 1848, his Honor Judge PEARSON presiding.

The prisoner was indicted in the County of Granville for the murder of James Meadows, and upon his affidavit his cause was removed to the County of Person, where it was tried on the last circuit.

After introducing testimony, to show that the dead body of James Meadows was found at the draw bars, about eighty yards from his dwelling house, on a cer-

tain morning in the month of September 1846, much cut, bruised, and lacerated, the Solicitor for the State called as a witness Seth Meadows, a son of the deceased. He stated that he was about nine years old when his father was killed; that his father, his sister Susannah, who was about fifteen years of age, several other children, and himself, lived in a small log house, containing but one room with two doors, one facing the north and the other the south, and no window; that on a certain Sunday night in the month of September 1846, his father and himself were sleeping in a bed near the north door, while his sister Susannah and the other children slept in another bed near the opposite door; that about two hours before day-break, he was awaked by the struggles of his father, when he saw three men drag him out of the bed, and take him out of the house through the northern door, one having hold of his head and the other two of his legs, and he thought that one of the men who had hold of his father's legs, was the prisoner, because he was yellow, was built like him and was about his size. The witness stated further, that, as soon as they got out of the door, he being much alarmed, went to the bed where his sister Susannah was sleeping and waked her up, and told her that some persons had carried their father out of the house, when she made one of the other children get up and shut the door, which they had left open. He stated further that it was a bright moon-light night, and that he was well acquainted with the prisoner, who was a low, thick-set, bright mulatto. The Solicitor then asked the witness, if he told his sister, when he went to her bed and waked her up, who he thought it was that had carried his father out of the house? This question was objected to by the prisoner's counsel, but the Court permitted the witness to answer, when he said that he told his sister that some men did it, but did not tell that he thought the prisoner was one of them. The Solicitor then asked the witness, whether he told his sister next

morning, who he thought one of them was; this question was also objected to by the prisoner's counsel. The Solicitor then remarked, that he was aware, that the prisoner's counsel expected to prove, that the witness, although several times interrogated upon the subject before the jury of inquest, did not state, until after the prisoner had been arrested, that he thought from the colour or other description, that either of the persons was the prisoner; but, on the contrary, had stated that he did not know who the persons were. The prisoner's counsel admitted that they expected to make the proof as suggested by the Solicitor, but they contended that although they had the right to impeach the witness, by proving that, when on oath or not on oath, he had made statements different from those made on the trial, yet that it was not competent for the State to sustain him by proving that when not on oath, he had made the same statement as he had made on the trial. The Court permitted the question to be asked, and the witness answered, that about day-break in the morning, some two hours after his father had been taken out of the house, he told his sister that two of the men were black like negroes, and the other was a yellow man like George, the prisoner. A similar question was permitted to be asked, after objection, whether the witness had told one William Philpot, the next morning, who he thought it was; and Philpot was then introduced, and permitted to state, after objection, that the witness, Seth Meadows, had told him, on the morning the dead body was found, that one of the persons, who committed the act, was yellow like George, the prisoner.

The prisoner's counsel then introduced witnesses, who stated that when the witness, Seth Meadows, was under examination before the jury of inquest, he was asked several times, whether he knew, who took his father out of the house, to which he replied, that he did not. They stated farther that he persisted in this answer, until, after the prisoner was arrested the next day, and that he then sta-

ted to the jury on oath, that one of the persons was yellow, and that from his colour, build, and height, he took him to be George, the prisoner.

The jury returned a verdict of guilty. A motion for a new trial was made upon the ground, that the Court had received improper testimony, but it was over-ruled by the Court. A motion in arrest of judgment was then made "because the certificate of the Clerk of the Superior Court of Law, in and for, the County of Granville, after the transcript had been sent to this (Person) Court, and during the term of this Court, and after verdict, was altered by the Clerk of the Superior Court of Law, in and for, the County of Granville, under his hand and seal of said Court, at the Court House in Roxboro' in Person County, so as to make it read "Clerk of the Superior Court of Law," instead of "Clerk of the Superior Court, &c." This motion was also over-ruled, and sentence of death pronounced, from which the prisoner appealed.

Attorney General, for the State.

E. G. Reade and *Gilliam*, for the defendant.

BATTLE, J. The objections to the admission of testimony, made by the prisoner on the trial, raise two questions for our consideration, of which, one is subordinate to the other. The first and main question is, whether, when a witness is sought to be impeached by proof of former statements, inconsistent with his testimony on the trial, it is competent for the party or prosecutor who has introduced him, to prove other consistent statements for the purpose of corroborating him. Upon this question, the English authorities are conflicting, and it is very difficult, if not impossible, to reconcile them. *Hawk.* 2, ch. 46, sec. 46, and *Gilbert in his treatise on evidence*, 150, (4th Ed.) followed by *MacNally*, 1 Vol. 378, and the case of *Luttrell* v. *Regnell*, 1 Mod. Rep. 284, support the affirmative, while Judge BULLER in his *Nisi Prius* 294,

doubts of, and in *Parker's case*, 3 Doug. Rep. 242, (20 Eng. C. L. Rep. 95,) dissents from the position, and declares for the negative; in which it is said that he has the sanction of the great names of Lords Redesdale and Eldon. The modern writers on the subject of evidence, in this conflict of authorities, have endeavored to effect a compromise by laying it down as a rule, that, when the counsel of the opposite party imputes a design in the witness to misrepresent, from some motive of interest or friendship, it may, in order to repel such imputation, be proper to show that the witness made a similar statement at a time when the supposed motive did not exist, or when motives of interest would have prompted him to make a different statement of facts. 1 *Phil. on Ev.* 293. *Roscoe's Crim Ev.* 142. But however it may be in England, we consider it settled in this State, that such confirmatory testimony is admissible. In the case of *Johnson* v. *Patterson*, 2 Hawks Rep. 183, Chief Justice Taylor declared, that, where evidence of inconsistent statements of a witness is introduced by the adverse party, it is proper to permit the party who called the witness, to prove other statements conforming to the testimony given on the trial; and in support of this he relied upon the authority of *Gilbert*. In the *State* v. *Twitty*, 2 Hawks Rep. 449, the Court extended the rule, and held that, in all cases where the credibility of the witness is attacked, from the nature of his evidence, from his situation, or from imputations directed against him in cross-examination, confirmatory evidence of this kind is admissible. In neither of these cases is the distinction, taken in *Phillip's* and *Roscoe*, adverted to; and we think that it is a distinction, which applies more properly to the *weight* than to the *competency* of the testimony. No objection was made on the trial, and none is insisted on in the argument here, to the time when the testimony was offered. As soon as the prisoner's counsel announced their intention to introduce the discrediting testimony, it

became proper to bring forward the confirmatory evidence. But if it had been improper then, it was made competent afterwards by the introduction on the part of the prisoner of the impeaching testimony. *Smith* v. *Smith*, 8 Ired. Rep. 29. Upon the main question of evidence then, we all agree in opinion, with the Judge in the Court below.

The subordinate question is, whether such confirmatory testimony can be given by the impeached witness himself, that is, can he testify to his own former declaration, consistent with his testimony given on the trial. The majority of us, NASH, J. *dissent.*, hold, that he can, and we so hold, because we are unable to discover any principal, by which the testimony can be excluded. We have all just agreed that the question is a proper one to be asked of *some* witness, and why may it not be answered by *any* witness, who is not forbidden to answer it on any one or more of the grounds of objection to the competency of witnesses? These grounds—and they are said by the highest authority to be the only grounds—are want of reason, defect of religious belief, infamy, and interest. LAWRENCE, Justice, in *Jordaine* v. *Lashbrook*, 7 Term Rep. 610, 1 *Phill. on Ev.* 18. The witness here is obnoxious to none of these objections. The testimony, it is true, is obviously of so weak and unsatisfactory a character, that we are surprised it was offered; but having been offered, and being of a kind proper in itself, and sworn to by a witness competent to testify in the cause, we can perceive no reason why it should have been excluded.

There is certainly no pretence for arresting the judgment for the cause assigned. The transcript of the record is duly certified to us, and it is now perfect, and we cannot enquire how it became so. *State* v. *King*, 5 Ired. Rep. 203. Besides a judgment can be arrested only for errors or defects, apparent on the record, but not for such as

require to be brought to the notice of the Court by proof *aliunde*.

It must be certified to the Court below, that there is no error in the record.

PER CURIAM. Ordered accordingly.

THE STATE *vs.* JOHN, A SLAVE.

In a case of homicide, testimony to prove that the prisoner's wife had been in the habit of adultery with the deceased, not that he caught them in the act of adultery at the time of the homicide, is not admissible, because, if admitted, it does not extenuate the offence from murder to manslaughter.

Nothing but finding a man in the very act can mitigate the homicide from murder to manslaughter.

Voluntary drunkenness will not excuse a crime, committed by a man, otherwise sane, while acting under its influence.

It is not error to poll the jury, and when each juror agrees to the same verdict, to enter it as the verdict of the whole jury.

Appeal from the Superior Court of Law of Craven County, at the Spring Term, 1848, his Honor Judge DICK presiding.

The prisoner was indicted for the murder of Ben Shipman, a slave, and was tried at Craven on the last circuit.

The Solicitor for the State examined first a negro woman slave, named Flora. She stated that she was the wife of the prisoner, and had been so for about six years; that the prisoner, although a slave, was permitted to keep house, and she was permitted to live with him; that she and the prisoner had frequent quarrels, and sometimes separated and came together again; that, some three or four days before the homicide, the prisoner, complaining that his dinner was not properly prepared, got angry, and gave her a whipping, and turned her out of his house, saying that she should not live with him any longer; that she then went to live with her mother; that about 10 o'clock of the night of the homicide, and about half an hour before it was committed, the prisoner came to her mother's house and told her, the witness, that he intended to kill Ben Shipman the first time he saw him, that at the request of her mother, she, and her sister Sophia, a little girl about ten years of age, went to the house of Ben Shipman, which was about ten steps distant from her mother's, and which they found open with a good fire-light in it; but Ben was not at home; that they sat down by the fire-light and commenced sewing; that shortly after Ben came in, when she told him of the prisoner's threat against him; that Ben then shut the door and locked it and went into an adjoining room, and lay down on a mattrass, leaving her and her sister Sophia sewing by the fire-light; that shortly afterwards the prisoner came to the door and knocked, when she asked "who was there," to which he replied "a person;" she asked what the person wanted, to which he replied "open the door or I will break it down;" that he thereupon did break it down, and came in and walked up to the deceased and knocked him down with a piece of iron which he held in his hand; that he struck the deceased several times while on the floor; that she became much alarmed and ran to call her brother from her mother's

house, and that her brother came immediately and got the prisoner out of the house of the deceased.

Sophia and several other witnesses were then examined for the State, as to the circumstances attending the homicide, but the testimony did not materially vary the case made by the statement of the first witness. From their examination it appeared, that the piece of iron, with which the blows were inflicted, was about the size of a man's thumb, and from a foot to eighteen inches long, and that Ben died that night from the effect of the blows.

The prisoner's counsel then announced the grounds of the defence:

First—That at the time the homicide was committed, the prisoner was laboring under mental alienation, to such an extent as to render him incapable of committing a crime.

Secondly—That there had been, and was, an adulterous intercourse carried on between Flora, the wife of the prisoner, and the deceased, which would extenuate the offence to manslaughter.

Thirdly—That the prisoner was drunk when the homicide was committed, and that it was proper for the jury to take his intoxication into consideration, as a circumstance to show that the act was not premeditated.

To show the prisoner's insanity and drunkenness, his counsel called several witnesses, among whom were slaves Hardy and Dansey. Hardy stated that he had been acquainted with the prisoner seven or eight years; that the prisoner was a house painter, and he had worked with him about two years; that during that time the prisoner was in the habit of talking to himself, and frequently swearing as if he were angry; that he had seen the prisoner throw down and spill his bucket of paint, and heard him the next day enquire what had become of it; that sometimes when he and the prisoner were at work on different parts of a house, he, the witness, would

think from the loud talk and swearing of the prisoner, that he was quarrelling with some person present, but, on enquiring, the prisoner would tell him that he was talking to himself. This witness testified further, that he saw the prisoner at about half-past 10 o'clock of the night when the homicide was committed; and that the prisoner was then so drunk, that he had to keep himself steady by holding on to the fence; that he seemed to be crazy and not in his right mind, and that he had no weapon, so far as the witness saw. Dausey testified, that he saw the prisoner about 9 o'clock of the night of the homicide; that he was talking to himself and seemed angry, and at times talked foolishly; that he seemed to be much enraged, and said he would have his wife out of Ben's house, towards which he was then going. Several witnesses were then called on the part of the State, for the purpose of showing that the prisoner was not insane.

The prisoner's counsel then proposed to prove that an adulterous intercourse had been carried on for some time preceding the homicide, between the deceased and Flora, the wife of the prisoner, and insisted, that a knowledge, or belief, of such adulterous intercourse by the prisoner, would mitigate his crime from murder to manslaughter. The Court rejected the evidence. The prisoner's counsel then proposed to prove by the declarations of the prisoner, made some time before the homicide, as well as by declarations made on the night of the homicide, that the prisoner was labouring under monomania on the subject of the adultery of his wife with the deceased. The Court rejected the declarations of the prisoner made some time before the homicide, but admitted those made on the night of the homicide and before it took place, to show the state of the mind of the prisoner. The witness Dausey was then examined as to those declarations and gave the same account, as is contained in his testimony above stated.

The Court charged the jury, that if the facts and circumstances testified by the witnesses were believed and satisfied them beyond a reasonable doubt that the prisoner slew the deceased, then the prisoner was guilty of murder, provided he was sane at the time, when he committed the act; and that the law presumed every man to be sane, until the contrary was proved; that, to establish a defence on the ground of insanity, it must be clearly proved, that, at the time of committing the act, the party accused was labouring under such a defect of reason from disease of the mind as not to have known the nature and quality of the act he was doing; or, if he did know it, that he did not know that he was doing wrong. The Court instructed the jury further, that voluntary drunkenness would not extenuate a crime, and that therefore the fact of the prisoner's being drunk, a short time before the homicide was committed, would not lessen his guilt, if they believed that he was sane before he became drunk.

The jury having retired under the charge of the presiding Judge to consider of their verdict, returned into open Court to deliver it, whereupon, on motion of the prisoner's counsel, the Court ordered that the jury should be polled, and that each juror of the panel should answer for himself what was his verdict in this prosecution, and the jurors of the jury aforesaid, having been polled and called separately and individually, did each and severally upon their oath say that the prisoner was guilty of the felony and murder in manner and form as charged upon him in the bill of indictment.

The prisoner's counsel moved for a new trial—

1st. Because the Court rejected the evidence offered to prove the adultery of the prisoner's wife with the deceased.

2nd. For misdirection of the Court on the subject of drunkenness.

3rd, Because the Court rejected a part of the evidence tending to show, that the prisoner was labouring

under monomania on the subject of his wife's adultery with the deceased.

The motion for a new trial was over-ruled by the Court, whereupon the counsel moved in arrest of the judgment for a defect on the face of the bill of indictment. This motion was also over-ruled and sentence of death pronounced, from which the prisoner appealed.

Attorney General, for the State.

J. H. Bryan, for the defendant.

BATTLE, J. We have considered the questions, presented by the counsel for the prisoner in his bill of exceptions, with all that care and anxiety for a right decision, which their importance both to the prisoner and to the State imperatively demanded. We have nevertheless been unable to find in the errors assigned, any thing of which the prisoner has a right to complain. The first exception is, that the Court erred in rejecting "the evidence offered to prove the adultery of the prisoner's wife with the deceased." This testimony was offered to prove, not that the deceased was found by the prisoner in the act of adultery with his wife, at the time when the homicide was committed, but that "an adulterous intercourse had been, for some time preceding the homicide, carried on between them;" and the counsel insisted that a knowledge, or even belief, of such adulterous intercourse, by the prisoner, would mitigate the crime from murder to manslaughter. No authority has been produced in support of this position, and so far as we can learn, all the authorities are directly against it. *Hale*, *Foster*, *East* and *Russell*, all agree in stating, that, to extenuate the offence, the husband must find the deceased in the very act of adultery with his wife. And so it must be upon principle. The law extends its indulgence to a transport of passion justly excited, and acting before reason has time to subdue it, but not to a settled purpose of vengeance, no matter how great the injury, or gross the

insult, which first gave it origin. A belief—nay, a knowledge, by the prisoner, that the deceased had been carrying on an adulterous intercourse with his wife, cannot change the character of the homicide. The law on this subject is laid down with much clearness and force by *Foster in his Crown Law*, 296, and with him all the other writers substantially agree. "A husband finding a man in the act of adultery with his wife, and in the first transport of passion killeth him; this is no more than manslaughter. But had he killed the adulterer deliberately and upon revenge, *after the fact and sufficient cooling time*, it had been undoubtedly murder. For let it be observed, that in all possible cases deliberate homicide, upon a principle of revenge, is murder." As then the evidence, which was offered to show the adulterous intercourse between the prisoner's wife and the deceased, could not, if received, have changed the nature of the offence, the Court did not err in rejecting it. But it is argued here, that the prisoner had just reasons for believing that the deceased was engaged in the act of adultery with his wife, at the very time when he broke into the house of the deceased and killed him. It may well be doubted, whether the testimony given on the trial supports this view of the case, but if it were admitted that it did, it could be of no avail to the prisoner. It is the sudden fury excited by finding a man in the very act of shame with his wife, which mitigates the offence of the husband, who kills his wrongdoer at the instant; but to the offence of one, who kills upon passion, excited by a less cause—by a mere belief of the act—the law allows of no mitigation.

The second exception is "for misdirection of the Court on the subject of drunkenness." All the writers on the criminal law from the most ancient to the most recent, so far as we are aware, declare that voluntary drunkenness will not excuse a crime committed by a man, otherwise sane, whilst acting under its influence. Even the ca-

ses relied upon by the counsel for the prisoner, *Rex* v. *Meakin*, 7 Car. and Payne 297, (32 Eng. C. L. Rep. 514,) *Rex* v. *Thomas*, Ibid, 817 and 750. 1 *Russ. on Crimes*, 8, all acknowledge the general rule, but they say, that, when a legal provocation is proved, intoxication may be taken into consideration to ascertain whether the slayer acted from malice or from sudden passion, excited by the provocation. Whether the distinction is a proper one or not, we do not pretend to say. It has been doubted in England, *Rex* v. *Carroll*, 7 Car. and Payne 145 (32 Eng. C. L. Rep. 417) and it is a dangerous one and ought to be received with great caution. But whether admitted or not, it has no bearing upon the present case. There is not a particle of testimony to show, that the prisoner was acting, or can be supposed to have been acting, under a *legal* provocation; and there was therefore no cause for the application of the principle, for which the counsel contends.

The third exception is, "because the Court rejected a part of the evidence, tending to show that the prisoner was labouring under monomania on the subject of his wife's adultery with the deceased." The testimony offered and rejected was "the declarations of the prisoner made some time before the homicide." We are not sure that we correctly understand this exception in the connection in which it was made. One of the grounds, of defence, taken by the prisoner, was, that he was insane at the time, when he committed the homicide, and, so far as we can discover, he was allowed to introduce all the testimony in his power to sustain it. Of that and of the charge of the Judge in relation to it no complaint is, or can be made, by the prisoner. Monomania is one among the various forms of insanity; it is a partial insanity upon one particular subject. As a species of insanity, it was competent for the prisoner to have proved it, and he was not restricted in his proof of it, so long as he insisted on it under the defence of insanity. It was not until after he had closed his testimony on that subject, and also on the

subject of drunkenness, that he offered the testimony which was rejected. We do not well see how the one could be separated from the other. The declarations too, what were they? Were they statements of facts by the prisoner offered as evidence of those facts? If so, they were clearly inadmissible. Were they wild, incoherent, and disjointed exclamations in relation to his wife's adultery, evincing that they proceeded from an unsound mind? If so, the prisoner should have offered them as proof under his defence of insanity, and they would doubtless have been received. If we are to judge of their nature from the declarations, which were received, as having been made on the night of the homicide, and proved by the witness Dausey, then they ought to have been rejected as the mere idle ravings of a drunken man. Our difficulty in understanding the exception is still further increased, by the apparently inconsistent grounds of defence assumed for the prisoner. One ground, which we have already considered, is that his wife was actually guilty of adultery with the deceased. Now if by monomania on that subject is meant, that the prisoner was labouring under mental delusion that his wife was guilty, when in truth she was innocent, then the fact of her innocence is directly opposed to what was asserted and offered to be proved by the prisoner's counsel. But if the prisoner's wife was guilty, and the insane delusion of his mind was, that he had the right to kill her paramour, then it would raise a most important and interesting question, whether insanity to that extent only would render him irresponsible for crime. It seems to be settled by the highest authority in England, that it would not, *Stark. on non compos.* 66. Note to *Regina* v. *Thigginson*, 1 Car. and Kir. and 47 Eng. C. L. Rep. 130. But we do not wish to express an opinion upon it, until the question is brought directly before us. In this case we are compelled to decide against the prisoner, because he has not shown us, that he has been deprived of any benefit or ad-

vantage, to which by law he was entitled. An exception has been taken here to the manner in which the verdict was rendered against the prisoner. It is contended, that the verdict is a nullity, because it was rendered by each juror severally, instead of by the whole jointly. We think that exception is not sustainable. The jury retired together, consulted together, came into Court together, to render their verdict jointly. At the instance of the prisoner's counsel, they were polled and each was called upon to say for himself, whether he found the prisoner guilty or not guilty. Each answered for himself, that he found him guilty. Surely such finding of each constituent member of the whole body, is in fact and in law the verdict of the jury, just as much as if they had returned their verdict in the usual manner through their foreman, and had then been polled and had spoken each for himself. The cases cited by the counsel, *Blackley* v. *Sheldon*, 7 John. Rep. 82, and *Watts* v. *Brains*, Cro. Eliz. 778, only show that after the verdict is received, but before it is recorded, the jury may, if the Court please, be examined by the *poll*, and then either of the jurors may disagree to the verdict. But here neither of them did disagree, and when the verdict was received and recorded, it became the joint verdict of the whole jury. Indeed, the verdict might have been, and should have been, entered in the usual form, without stating upon the record that the jury had been polled. A motion was made in the Court below, and has been renewed here, to arrest the judgment for a defect alleged to be apparent on the face of the bill of indictment. The defect has not been pointed out to us, and the closest scrutiny has not enabled us to detect it ourselves.

We must therefore direct it to be certified to the Superior Court of Law for Craven County, that there is no error in the record.

Per Curiam. Ordered to be certified accordingly.

JACOB HIATT vs. ELISHA WADE.

Under our Act of Assembly of 1840, ch. 28, a purchaser from a fraudulent grantor to a prior grantee shall not be protected in his purchase unless he has purchased for a full value and without notice of the fraudulent conveyance.

Appeal from the Superior Court of Law of Guilford County, at the Spring Term, 1848, his Honor Judge PEARSON presiding.

This is Trover for two stacks of hay. Plea, not guilty. Upon the exception, the case appears to be as follows.

Adam Sharp owned a tract of land in fee, containing 409 acres, and resided on it. He had a son named Samuel, and he permitted him, upon his marriage, to build also on the land and cultivate the greater part of it. The father and son kept separate houses, and cultivated distinct portions of the land. After they had thus continued many years, Adam Sharp in May 1842 conveyed the whole tract in fee to Samuel Sharp in consideration of $2000 paid, as expressed in the deed; and that was a fair price for it. Just before his death in November 1843, Samuel Sharp, in consideration of love and affection, conveyed the premises in fee to the plaintiff and his wife, who was the daughter of Samuel. Adam Sharp continued to live on the land and to cultivate his portion of it, as he had before, until May 1845, when he removed from the State. When going away, he sold and conveyed to the defendant the crop of grass growing on the meadow in his occupation, in consideration of the sum of $50, which was its full value and then paid. After the conveyance to the plaintiff and his wife, the plaintiff immediately entered into those parts of the land, before occupied by Samuel Sharp; and, as soon as Adam Sharp

went away, the plaintiff took possession of the residue of the land, and shortly afterwards cut the grass and stacked the hay on the meadow. In a few days the defendant carried it away, and the plaintiff brought this action. On the part of the defendant evidence was given, that many years before 1842, Adam Sharp, as surety for another person, became bound in a bond for $30,000, and that a suit was pending against him thereon, when he made the deed to his son in May 1842, and that it was in 1844 compromised for the sum of $1,200 paid by the same Adam: And evidence was further given, that the consideration of $2,000 mentioned in the deed to Samuel, was not in fact paid, but that only a bond was given for it; and that afterwards the parties, Adam and Samuel, stated to a witness, that it was never meant that it should be paid, as the father had always intended to give the land to his son and made the deed to that intent, but put it in the form of a sale and took the bond for the price, in order to keep the land from being sold under execution, in case judgment should go against the said Adam in the suit then pending: And evidence was further given, that at the same time and upon the ground of such understanding as aforesaid, the witness by the direction and in the presence of Adam and Samuel, entered on the bond a credit for the sum of $1,800, without any part of it being paid and in order to prevent Samuel, upon the death of his father, from being liable for that sum to the other members of the family.

On the part of the plaintiff evidence was then given, that when the defendant purchased the grass from Adam Sharp, he was informed of the deed from him to his son Samuel, and from the latter to the plaintiff and his wife.

The counsel for the defendant moved the Court to instruct the jury, that, notwithstanding the defendant's knowledge of the deed from Adam Sharp to Samuel, the same was void, as against the defendant, if the jury be-

lieved that he was a purchaser for full value and that the deed was voluntary and made with an actual intent to defraud. The Court refused the instruction, and directed the jury, that, admitting the deed to have been made in fraud of Adam Sharp's creditors and also with intent to defraud subsequent purchasers from the grantor, it was, nevertheless, valid against the defendant, if he had notice of it when he bought. The plaintiff obtained a verdict and judgment, and the defendant appealed.

Iredell, for the plaintiff.
Morehead, for the defendant.

Ruffin, C. J. A point obscurely appears in the case, of which something might, possibly, have been made for the defendant, if it had been urged on the trial. It is, that Adam Sharp, by the consent of his son and the plaintiff, actually occupied parts of the land, he had conveyed, including the meadows on which the grass grew, and, as he remained on the land for about five months of the year 1845, that he was entitled to the grass then growing and could, consequently, sell it. However that might be, the question was not raised on the trial, and therefore cannot be considered here.

On the point which was made, the decision is clearly supported by the Act of 1840, c. 28. The *St.* 27 *Eliz.* c. 4, enacts, that conveyances of land, made with intent to defraud purchasers, shall, only, as against purchasers for good consideration, be void. Under that Act it was, of course, held, that notice of the fraudulent deed did not impeach the title of the purchaser; because the bad faith of the deed vitiated it, and, with notice of the deed, the purchaser had also notice of the fraud. But the legislature thought proper in 1840 to alter that and declare, that no person shall be deemed a purchaser within the meaning of the former Act, unless he purchase the land

for the full value thereof, without notice, at the time of his purchase, of the conveyance by him alleged to be fraudulent. This language is as precise and positive as it can be. It is not open to construction, and is decisive against the defence. The counsel for the defendant has, however, zealously argued against it, because thereby a transaction, expressly designed to defraud the donor's creditors, and essentially dishonest, becomes good as if it had been founded on honest purposes, merely from the fact, that the purchaser from the fraudulent grantor had knowledge of the deed, though at the same time he had knowledge also of the dishonesty of it. It was contended, that the legislature could not have meant to adopt a principle in support of contracts so immoral. But it is in vain upon any such reasoning to struggle against the express words of an Act of Assembly. Besides, the legislative purpose in the Act seems to be misunderstood. It was not simply to give efficacy to fraudulent conveyances. They were before valid against the parties and all the world, except two classes of persons, namely, creditors and purchasers for value. Now in respect of the latter class, the Act of 1840 changes the policy thus far: that conveyances shall be good against them, as against the rest of the world, unless they buy for a full price and without knowledge of the fraudulent conveyance. In other words, the Act means, that such a purchaser shall not take advantage of the prior fraud, because he was not, himself, a meritorious purchaser, since he either did not give a fair price, or bought with his eyes open and to enable the vendor to defeat his own prior conveyance. Which is the better policy of the two, and tends the more to moral ends, it was for the legislature to consider. The Courts must administer the law as it is given to them by the legislature.

Per Curiam. Judgment affirmed.

THE STATE *vs.* JOHN BARFIELD.

It is perfectly settled that no words or gestures, nor any thing less than the indignity to the person of a battery or an assault at least will extenuate a killing to manslaughter. To constitute an assault there must be an attempt or offer to strike by one within striking distance.

On a trial for murder, evidence of the general character and habits of the deceased, as to temper and violence, cannot be received. The only exception to this rule, if there be one, is where the whole evidence as to the homicide is circumstantial.

An affidavit for the removal of a cause ought no more to be inserted as a part of the record, than one for a continuance.

It is not necessary that the record should shew a *venire facias*, either original or special, to the term of the Court, at which a prisoner is tried.

The cases of the *State* v. *Tilley*, 3 Ired. 424, *State* v. *Upton*, 1 Dev. 513, *Ballard* v. *Carr*, 4 Dev. 575, *State* v. *Reid*, 1 Dev. & Bat. 377, *State* v. *Seaborn*, 4 Dev. 305, and *State* v. *Laman*, 3 Hawks 175, cited and approved.

The cases of the *State* v. *Tacket*, 1 Hawks 211, and the *State* v. *Twitty*, 2 Hawks 248, cited and commented on.

Appeal from the Superior Court of Law of Johnston County, at the Spring Term, 1848, his Honor Judge CALDWELL presiding.

The prisoner was indicted in Sampson County for the murder of Alfred Flowers, and, after plea, of not guilty, on his motion and affidavit, the trial was removed to Cumberland. He was there tried and convicted, but, upon an appeal to this Court, the judgment was reversed, and a *venire de novo* awarded. 7 Ired. 299. At the next term of Cumberland Court, in November 1847, the prisoner offered an affidavit on which he moved for another removal of the trial, and the Court ordered it to be removed to Johnston Superior Court.

On the trial the widow of the deceased gave evidence for the State, in substance, and almost literally, the same

as that given by her on the former trial, as stated in the report of the case in this Court.

On the part of the prisoner, Robert Flowers was examined as a witness. He was a son of the deceased, and was 15 or 16 years old at the time of the homicide; and he stated: That he was not at home until late in the day, on which the homicide was committed; that when he went into the house, he saw the prisoner sitting on a table with a gun in his hand, and that he requested the prisoner to give it to him, and he immediately complied: that he went out of doors and when he came back, he found the prisoner lying on the bed, and that his father sent him to draw some liquor, and when he returned, he found his father sitting on a chair near the door: that some angry words passed between his father and the prisoner, and that the latter was standing near the middle of the room and cursed the liquor: that his father rose up and took a light chair in his hand and pitched it over the head of the prisoner without touching him and, as the witness believed, without intending to strike the prisoner: that in doing so, his father staggered and fell, when the prisoner rushed upon him instantly and stabbed him: that he did not see the prisoner have a knife in his hand, when he first came towards his father, but he saw the prisoner draw it from his pocket at or about the time his father raised the chair: that immediately after his father was stabbed, he got up and went towards the door, and the prisoner followed him, and stabbed him in the back, and his father then went to the bed, laid down, and in a few minutes died: that he did not see his mother assist his father to get up, or to get to the bed, and that he thought, if it had been so, that he would have seen it: that after his father was dead, he went out of the house and saw the prisoner at the gate, and asked him, "why he had killed his father?" to which the prisoner replied, "that if he did not clear out, he would send him off with a cut throat."

The case further states, that the prisoner then examined as a witness John Flowers, another son of the deceased, a little younger than his brother Robert, and that he testified to the same facts, except that he said the prisoner was advancing on his father, when he raised the chair.

The counsel for the prisoner then offered to prove by a witness, who had formerly lived with the deceased, that his general character was that of a violent, overbearing, and quarrelsome man, and that such were his domestic habits. On objection made on the part of the State, the Court rejected the evidence.

On the part of the prisoner, a witness named Cobb was examined, and stated, that he was one of the jury at the coronor's inquest over the body of Flowers, and that Mrs. Flowers swore on that occasion, that she was not in the house, when the fatal rencounter took place, but that she became alarmed and had left the house before it happened.

On cross-examination he was asked, whether he had not told two persons, named Hicks and Lane, that Mrs. Flowers swore before the jury of inquest that she was in the house and saw the transaction; and he denied that he ever made such a statement to them or either of them. On the part of the State Hicks and Lane were afterwards called to prove, that Cobb did state to them, that Mrs. Flowers swore before the jury, that she was in the house and witnessed the rencounter. This testimony was objected to by the prisoner's counsel, but received by the Court.

The counsel for the prisoner insisted before the jury, that Mrs. Flowers was not entitled to credit; and that, taking the case on the testimony of the two sons, there was such a provocation, as mitigated the killing to manslaughter.

The presiding Judge charged the jury, that, if Mrs. Flowers was to be believed, the prisoner was guilty of murder. But if they did not believe her, then they would look to the testimony of Robert and John Flowers, in order to

ascertain the degree of homicide: and in relation to their evidence, the Court stated to the jury, that if the deceased pitched the chair over the head of the prisoner without intending to strike him, and that was manifest to the prisoner, there was no such legal provocation as would mitigate the killing to manslaughter, but the prisoner would, in that view of the case, also, be guilty of murder.

The jury convicted the prisoner of murder; and his counsel moved for a *venire de novo*, because of the rejection of the evidence offered by him, and of the admission of that of Hicks and Lane to contradict Cobb, and for misdirection. The Court refused the motion, and, after sentence of death the prisoner appealed.

Attorney General, for the State.
J. H. Bryan, for the defendant.

RUFFIN, C. J. Although it was not contended on the trial, that the offence of the prisoner did not amount to murder, if the account given by the widow of the deceased was true, yet, as the case comes here, that question is one of those to be considered by this Court. Upon it, we must say, that it admits of no doubt, that it was murder, according to her account. She stated, that, after some angry words on each side, the prisoner with his knife drawn approached the deceased, thrusting at him, and that the deceased then raised the chair, and pitched it over the others head, but without striking or intending to strike him, and that, in making that effort, he staggered from drunkenness and fell, and that then the prisoner, who, though he had been drinking, was not drunk, rushed on the deceased, while down, and stabbed him several times; and, moreover, that she assisted her husband to rise, and, that, after he had done so, the prisoner pursued him, and again stabbed him in the back once or twice. This represents the prisoner, in every respect as

the aggressor, and grossly so: intending, and in the act of making on the deceased, a deadly assault with a drawn knife, as the beginning of the affray, and executing that intention (without receiving a blow from the deceased or an attempt to give one.) by stabbing the man to death, while he was helpless on the floor, or, after rising, while retreating. Thus represented, there is nothing in the transaction to extenuate the killing from murder of a very dark hue, perpetrated in a cruel and diabolical fury.

The character of the killing does not seem to be materially varied, in a legal sense, by the testimony of the sons. One of them said expressly, that the prisoner was advancing on the deceased when he raised the chair. The same is to be implied from the testimony of the other, "that he did not see the prisoner have a knife in his hand, when he *first* came towards the deceased, but saw him draw it, at or about the time his father raised the chair." Then, it must be taken, that the prisoner, upon angry words, was advancing in a hostile manner upon the deceased, and drew his knife as he went, and that, at or about that instant, the deceased raised and pitched a light chair over the prisoner's head, without intending to strike him, but only in order to check the attack, and although it was "manifest" to the prisoner, that the deceased did not intend to strike him, and in fact he had not done so, that the prisoner continued to press on the other, who had reeled and fallen, and killed him by repeated stabs before and behind, the deceased being all the time down and unresisting, or retreating. If necessary, it might well be considered, whether a killing in this ferocious manner, a man in the condition of the deceased, would not be murder, though there had been a slight blow with a chair, given by him when so drunk and weak as not to be able to stand up, to another then advancing for the purpose of combat with a deadly weapon drawn before receiving the blow. But we do not

pursue that view of the subject, because, in fact no blow was given to the prisoner, nor any intended; and therefore there could be no provocation to palliate the killing from murder, since, from a reasonable regard for the security of human life, it has been long and perfectly settled, that no words or gestures, nor any thing less than the indignity to the person of a battery, or an assault at the least, will extenuate a killing to manslaughter. To constitute an assault there must be an atttempt or offer to strike by one within striking distance. And here both the witnesses and the jury concur in saying, there was no intention to strike, and that it was clear and evident to the prisoner, that there was not. The Court is therefore, of opinion, that there was, in the instructions to the jury, no error to the prejudice of the prisoner.

It is of great importance to the due despatch of business, and the correct decision of controversies, that no evidence should be heard which is foreign to the issue; and this rule is no less applicable and useful in criminal, than in civil, cases. Upon this principle, and because, if received, the evidence of the general character and habits of the deceased, as to temper and violence, could not rationally and legally affect the degree of homicide in this case, but might mislead the jury, the Court holds, that it was properly excluded.

The law no more allows a man of bad temper, and habits of violence to be killed by another, whom he is not assaulting, than it does the most peaceable and quiet of men. But it is said, that it ought to be heard as some evidence—to weigh with the jury—that the deceased, being habitually a brawler and breaker of the peace, was, probably, in this particular controversy, the aggressor, or, at least, that the slayer might for that reason have thought himself in danger from him, and acted on that apprehension. Now no such principle or decision is found, as that a person may kill another, because from his former course of life, as a fighter, he apprehends an assault from him, though it be, even

a violent one. A person may, indeed, receive such sure information of the intention of another to attack his life upon sight, as to cause him fully to believe it; and, in a moral point of view, he may, in such a case, be excused for getting the advantage on a favourable opportunity and killing first, or even for seeking private means of killing the other, in order, as he thinks, to save his own life. The pardoning power would, doubtless, be strongly moved by those palliating considerations, to stay the punishment annexed by the law to the offence. But it it clear, that the legal guilt would be that of murder; because there was not, at the time, a pressing necessity to kill, arising out of an assault, and immediate danger to the person killing, nor any accompaying provocation to arouse the passions, and acted on before the passions had cooling time. It would be murder, because the killing would be deliberate; and we know of no deliberate killing that is not murder, unless it be commanded by the law, or justified by the urgent necessity of self defence, when the party is in impending peril of the loss of life or great bodily harm from an actual and unavoidable combat. It is too much to stake the life of one man upon the fears of another of danger from him, merely upon his character for turbulence, and when he is making no assault. Such would be the case, here, if the evidence had been received; for the prisoner's own witnesses proved that there was no assault on him. It is the fact, and not the fear of an assault, that extenuates the killing, upon the supposition that it instantly rouses the resentment to an uncontrollable pitch. It is possible, when the case is one of circumstantial evidence, and there is no direct proof of the quarrel and combat, that evidence of the character of the deceased might be mercifully left to the jury in aid of their enquiries into the origin and progress of the conflict, in which the prisoner took the other's life. It was allowed, and on that principle, in *Tacket's case*, 1 Hawks 211. That is the only instance, in which, even

in a case of circumstantial evidence, such proof was held to be proper, as far our researches and those of the Bar have discovered. It is stated in the notes on the American edition of *Phillips on Evidence*, as a solitary case, and as one, in which the Court admitted, that such evidence must be confined to the killing of slaves. Cowen and Hill's notes to *Phill. on Ev.* 461, note 345. Although the case is not, we think, obnoxious to the sneer of the annotator in respect to its application to the killing of slaves alone, yet we cannot act on it as an authority in this case. It does not profess to be founded on any precedent, and the reasoning of the Court confines its application to the case of presumptive evidence before it, in which there was "not any direct proof" of the immediate provocation or circumstances under which the homicide was committed. In such a case the Court say, if the general behaviour of the deceased was marked with turbulence and insolence, it might in connexion with the threats, quarrels, and other existing causes of resentment against the prisoner, *increase the probability*, that the latter had acted under strong and legal provocation; while, on the contrary, if the behaviour of the deceased was usually mild and respectful towards white persons, nothing could be added by it to the force of *the other circumstances*. It is plain therefore that the decision is put distinctly upon the ground, that the case was one of circumstantial evidence only, in which the existence or want of provocation was matter merely of presumption, to be deduced, therefore, by the jury, from every slight thing that could add a shade to the presumption favourable to the accused. The case has never come directly under consideration hitherto; though it was urged in *Tilley's case*, 3 Ired. 424, where evidence nearly of the same kind was rejected, and in which the Judges meant to intimate their doubts of it by saying, that temper and deportment, "if they were evidence at all,"

were to be established as facts, and not by reputation. But whether *Tackett's case* be law or not, it has no application here; because this is a case of the opposite kind—one, in which three witnesses were present from beginning to end, who depose directly to the different occurrences, and even those, who were called by the prisoner, prove affirmatively, that the deceased did not make an assault, or give the prisoner any legal provocation, but that the prisoner was the aggressor. What possible legitimate end could evidence of the character and temper of the deceased answer in that state of facts? If good, and there was direct evidence that the deceased assaulted the prisoner, it would not aggravate the prisoner's guilt, and make it murder. So, if bad, it could not mitigate it to manslaughter, where it appears directly, that notwithstanding his temper, he was for that time, at all events, not in fault, but that the prisoner was. The evidence of the deceased's character neither disproves the facts proved by the witnesses, nor impeaches their credibility. For these reasons, and because we think, if there were any such general rule of evidence, as that urged for the prisoner, it would have been laid down in some one of the numerons treatises on this branch of the law, the Court holds the evidence was properly rejected.

Upon the other point of evidence, the opinion of the Court has been given in the case of *Edwards* v. *Sullivan* during this term; and the reasons are there so fully stated as to leave nothing to be added.

There is therefore no ground for a *venire de novo*. But, upon the supposition that he might fail on that part of the case, the counsel for the prisoner here also moved in arrest of judgment.

The first reason assigned is, upon the authority of *Twitty's case*, 2 Hawks 248, because the affidavit of the prisoner, on which he moved and the Court ordered the removal of the trial to Johnston, is not set forth in the tran-

script from Cumberland. If that were material, it would be the duty of the Court to have the omission supplied and the transcript completed by the insertion of the affidavit. *State* v. *Upton*, 1 Dev. 513. *Ballard* v. *Carr*, 4 Dev. 575. *State* v. *Reid*, 1 Dev and Bat. 377. But since *Seaborn's case*, 4 Dev. 305, it has been considered by all the Judges of this Court, and, we believe, by the profession generally, that the affidavit for removal ought no more to be a part of the record, than one for continuance. It is evidence to the presiding Judge and his determination of the question of removal, for the causes suggested, is final, like every other decision of a matter of fact by him.

A second reason in arrest is, that the record does not show a *venire facias*, either original or special, to the term of Johnston Court, at which the prisoner was tried, but merely sets forth a jury of twelve freeholders, who tried and convicted the prisoner. That is sufficient. It is according to the settled course, to which no exception is remembered. It is the practice in making up the record to set forth the *venire*, at the term at which the indictment was found, in order, we suppose, to show that the grand-jury was properly constituted. That practice it is well enough to continue, though it does not seem essential, as it has been often decided, that objection can be taken to the competence of grand-jurors only before plea in chief, or, at all events, before trial. Therefore after conviction it must suffice, if the record show a grand jury of the requisite number of good and lawful men, upon whose oaths the accusation was presented, without designating the mode of their selection. But in no instance has the *venire* been set out in the record, in order to show a proper constitution of the petit jury. If it happen, that the trial is at the term at which the indictment is found, then the *venire* appears. But even then, if one or more talesmen be of the jury, it will not appear, how he or they were

selected; and when the trial is at a subsequent term, no *venire* for that term ever appears in the record, but only that a jury composed of twelve certain good and lawful men upon their oaths found the prisoner guilty. The reason is, that in our law a *venire* is not issued for each case, either originally, or to supply a defect of jurors. The statute directs a general *venire* for not less than 30, nor more than 36, freeholders, to attend the Court during the whole term, or until discharged; and, further, in order that there may be no defect of jurors, that the sheriff shall summon, from day to day, of the by-standers, other jurors, being free-holders, to serve on the petit jury during that day, "for the trial of all cases," and not any particular one. In respect to talesmen, then, there is no *venire*, but any free-holder in Court is competent and may be called in, *Lamon's case*, 3 Hawks 175; and as the whole jury may be constituted of talesmen, the *venire facias* for the original panel need not be set out, since, whether the jury be constituted of persons taken from it or from the by-standers, it is equally legal. It is true, both the State and the traverser have the right to a jury of the original panel, if it can be had; and it is therefore error to refuse it. But, when a question of that kind arises, it may be put on the record with a statement of the facts directly, on which the exception is founded. It is not necessary that it should in the first instance appear, that the jury was or was not composed either wholly or in part of the original panel; but it is presumed the Court proceeded rightly and regularly in forming the jury, and in the trial, unless the contrary appear.

It must therefore be certified to the Superior Court, that there is no error in the judgment.

PER CURIAM. Ordered to be certified accordingly.

BAILEY, J., *dissentiente.* I cannot concur with the majority of the Court, upon the question of the admissibility of the testimony offered by the prisoner, to show the character of the deceased for violence. It is with unaffected diffidence that I place my opinion in opposition to theirs, but, in doing so, I am consoled by the reflection, so often felt and expressed by Judges placed in a similar situation, that the conclusion to which I have been led, however erroneous, will at least be harmless. A homicide committed, otherwise than by virture of a legal precept, must be either murder, manslaughter, or excusable homicide. With malice it is murder, and even in the absence of express malice, it is still murder, unless the prisoner can show from the attendant circumstances, that it was prompted by legal provocation, committed by accident, or rendered necessary in self defence. Every fact and circumstance, which surround the main fact of the homicide, become therefore matters of vital importance, and ought to be admitted in evidence, when they can throw the least light upon it. It seems to me, that the character of the deceased for violence is one of those attendant circumstances, which will always have some, and often an important, bearing upon that which must necessarily be the subject of investigation, that is, what were the motives which impelled the slayer to act? Take first the case, where the prisoner defends, upon the ground, that he killed his assailant in his necessary self protection. To sustain his defence, he must show to the satisfaction of the jury he was assailed and that he had retreated, as far he could with safety to his own life, before giving the mortal stroke, or that the violence of the assault was such that retreat was impracticable. Is it not manifest, that his apparent danger would depend much upon the character of the assailant for mild and amiable temper or for violent and ungovernable passion? With an assailant of the former character, he would have little to fear under circumstan-

ces, in which with the latter his life would be in great peril. Let it be recollected, too, that he has to judge and to act at the instant, upon the most tremendous reponsibility. If he strike too soon he is condemned to a felon's death upon the gallows. If he strike too late he falls by the hands of his adversary. Surely the jury, who tries him, ought not to require from him proof of the same forbearance, when attacked by a man of blood, as when attacked by a man of peace. His danger would undoubtedly be greater in the one case than in the other; why then not allow him to prove it? There is certainly nothing in the nature of the testimony, which ought to forbid it. Proof of the superior physical strength of the deceased is always admitted; why then not admit proof of that, which gives to the physical strength much of its force, and all of its danger. It appears to me, too, that the privilege, which the prisoner has, of giving in evidence his own peaceable general demeanor, is of an analogous nature. Testimony of the kind is not only admissible for the prisoner, but it has been said by very high authority that it is often testimony of much weight. Chief Justice HENDERSON says, in the case of the *State* v. *Lipsey*, 3 Dev. Rep. 493, that "the peaceable and orderly character which the prisoner had ever borne, had, I think, more "*than but little weight*" which the Judge in the Court below had been disposed to allow, when the facts attending the homicide had been positively sworn to." The character of the prisoner is offered only as presumptive evidence, and the character of the deceased is offered for no more, but, as presumptive evidence, it does seem to me to be as strong, and therefore ought to be as readily admitted as the other.

If I have been successful in showing that the testimony of the violent character of the deceased ought to be admitted for the prisoner, when he defends upon the ground of killing in self-protection, the same process of reasoning will lead to the conclusion, though in a less striking

manner, that it ought to be admitted to show that the prisoner acted upon a legal provocation. That, which would be considered legal provocation, when offered by a man apt to strike and ready to shed blood, might, very properly, not be so regarded when offered by one of a contrary disposition. But it is said, that the right to kill does not depend upon the character of the slain—that the law throws its mantle of protection equally over the violent and the gentle, as the rain falls from Heaven equally on the just and on the unjust. That is admitted, but it proves nothing. It is true that the killing of a violent and blood-thirsty man, without provocation or excuse, is as much murder, as the killing of any other person; but in ascertaining the fact whether there was such provocation or excuse, I contend, that the character of the violent man affords important presumptive testimony in favor of the accused. It is urged again, that where the proof is positive and clear, that there was no legal provocation, the evidence of character can have no effect, and on that account ought to be rejected. To this I answer that plenary proof on one side can never justify the rejection of testimony, otherwise competent, on the other. The argument confounds the *effect* and the *competency* of testimony. Testimony, which is competent, which may be introduced at all—may be introduced, no matter how little may be its effect, —nay even, if it be perfectly manifest in the particular case that it can have no effect whatever. It is urged further in the case before us, that the jury have found that there was no legal provocation and therefore the evidence must be rejected, as being entirely immaterial and useless. The reply is that it was offered before the *jury had so found*, and if it had been admitted, it is possible, that their deliberations might have led them to a different conclusion. But it is urged finally, that there is no authority in favor of the admissibility of such testimony. However this may be elsewhere, I contend that it is not

so in this State. In the case of the *State* v. *Tacket*, 1 Hawks Rep. 210, the prisoner was indicted for the murder of a slave. No witness was present when the homicide was committed; and the testimony against the prisoner consisted principally of his declarations, and of circumstances connected, more or less remotely, with the transaction. In the progress of the cause, the prisoner offered to prove "that the deceased was a turbulent man, and that he was insolent and impudent to white people; but the Court refused to hear such testimony, unless it would prove that the deceased was insolent and impudent to the prisoner in particular." The prisoner having been convicted and having appealed to this Court, it was decided that the testimony was proper and ought to have been admitted. TAYLOR, Chief, Justice, delivered the unanimous opinion of the Court, in which, after remarking upon the character of the testimony, and the nature of the enquiry, he said: "It cannot be doubted, that the temper and disposition of the deceased, and his usual deportment towards white persons, might have an important bearing upon the enquiry, and, according to the aspect in which it was presented to the jury, tend to direct their judgment as to the degree of provocation received by the prisoner. If the general behavior of the deceased was marked with turbulence and insolence, it might, in connexion with threats, quarrels and existing causes of resentment he had against the prisoner, increase the probability, that the killer had acted under a strong and legal provocation." Here there is a case, in which it was distinctly declared, that, the character of the deceased might be offered in evidence on behalf of the prisoner. An attempt is made to destroy the effect of this decision and of its applicability to the case before us, by saying that it is an authority only in a case where the deceased was a slave, and where there was no direct testimony as to the provocation, under which the prisoner acted. To the first of these objections the reply is that the Court cer-

tainly, did not assign the fact of the deceased being a slave, as a reason for admitting the testimony. It is true, that a slighter cause would be a legal provocation in the case of a slave, than in the case of a white man: but they did not intimate that the provocation was to be proved by a different kind or degree of testimony. The second objection is better founded; but I can see no reason for the distinction. The testimony as to character may perhaps be stronger in the case, where there is no direct and positive evidence as to the provocation, than where the evidence is only circumstantial; but its object and its office are the same in both cases; that is, to ascertain whether the slayer acted upon, or without, a sufficient provocation. If admissible, then, in one case, it ought not to be rejected in the other.

Upon the whole, I am of opinion, that testimony of the character of the deceased for violence may be offered by the prisoner in all cases, where the enquiry is, whether he acted from malice or upon legal provocation or excuse.

PER CURIAM. Ordered to be certified to the Court below that there is no error.

ANDERSON P. ADCOCK AND WIFE *vs.* JOHN R. MARSH AND WIFE.

When slanderous words are uttered, the law *prima facie* implies malice, except in the case of a privileged communication, which is, where the party is acting under a duty either legal or moral, towards the person to whom he makes the communication. In such a case malice must be proved by the plaintiff, and it is a question of fact for the jury.

In an action of *tort*, where the plaintiff seeks to recover, and is entitled to, vindictive damages, he may give in evidence the pecuniary circumstances of the defendant.

Appeal from the Superior Court of Law of Chatham County, at the Spring Term, 1848, his Honor Judge PEARSON presiding.

This is an action to recover damages for words spoken. It appears that the plaintiff Joseph Ann, is the second wife of the plaintiff Adcock, and that the latter had, by his first wife, two daughters, one of whom was named Sally. It further appears that the first Mrs. Adcock had requested the defendant Emeline Marsh, with whom she was very intimate, to give her daughters advice. Accordingly the defendant, Mrs. Marsh, after the intermarriage of the plaintiffs, advised Sally Adcock, that she and her sister ought not to live at her father's, giving as her reason, that her step mother was reported to be a loose woman, and too intimate with an individual, whose name was mentioned, and advised her to mention it to her father. And to Mary Moore, the maternal aunt of Sally Adcock, she made use of language much stronger. No question is made, but that the words used by Mrs. Marsh, on both occasions, were in themselves, *prima facie*, actionable.

The plaintiffs declaration contains two counts, one for the words spoken to Sally Adcock, and the other for

those spoken to Mary Moore. With a view to vindictive damages, the plaintiffs counsel offered to prove, that the defendant Marsh was worth between two and three thousand dollars. This testimony was objected to, but received by the Court. Much testimony was introduced to discredit Mary Moore, and the defendants counsel insisted that the plaintiffs were not entiled to a verdict on the count framed on the words spoken to her, and asked the Court to charge the jury, on the first count, that the confidential relation existing between the witness Sally Adcock and Mrs. Marsh, and the occasion for using the words, rebutted the implication of malice. The Court refused so to charge, but instructed the jury, that when slanderous words were spoken, malice was implied, unless the occasion and relation of the parties rebutted the implication, and that in this case there was no evidence showing such an occasion for speaking the words, or such a relation between the defendant Emeline and Sally Adcock, as would rebut the implication of malice. For supposing the mother of Sally Adcock had requested Mrs. Marsh to give her daughters advice, still as their father had placed over them, by his second marriage, a step mother, there was no excuse in law for Mrs. Marsh speaking to the witness the slanderous words of the plaintiff, however much it might mitigate the damages.

The jury returned a verdict for the plaintiffs and the defendants moved for a new trial, because the Court received improper evidence, and for error in law in the charge. From the judgment on the verdict the defendants appealed.

McRae and *Waddell*, for the plaintiffs.
Kerr, for the defendants.

Nash, J. We are relieved from any consideration of the case, growing out of the charge contained in the second count in the declaration. The case, as presented

to us, is confined to the first count, for it is the error committed, or alleged to be committed by the presiding Judge in considering the case, under that count, to which our attention is directed.

We think his Honor was correct in refusing to give the charge requested, and that he erred in the latter part of his instruction upon this point. The instruction required assumed, that the question was one purely and entirely of law, for it was, "that the confidential relation existing between the defendant, Mrs. Marsh, and the witness, and the occasion for using the words, rebutted the implication of malice." This instruction, the Court could not give, because it involved an enquiry of fact, which it was the province of the jury alone to make. And we think his Honor, in instructing the jury "there was *no evidence* showing such an occasion for speaking the words, or such a relation between the witness and the defendant, as would rebut the implication of malice," erred, for the same reason, because in this case, malice, was a question of fact for the jury, which his Honor could not decide. He must have meant, in the latter part of this charge, that, although the mother of Sally Adcock, had requested Mrs. Marsh to advise her daughters, that did not make her communication a privileged one. In this there was error. We hold that it was a privileged communication, if made by Mrs. Marsh in good faith, and of the *bona fides* the jury were the exclusive Judges, and it ought to have been left to them. The idea seems to have been, that the communication was not a privileged one, because the defendant had no interest in the matter, and stood in no relationship to the witness, but was, in every respect, a volunteer. In general, when words slanderous in themselves are uttered of another, whether written or verbal, the law implies malice. But there is a class of cases, in which, although the words are actionable, yet from the relation in which the party publishing stands

to the individual, to whom they are published, or to the subject matter, the idea of malice is rebutted, and the words cease to furnish the foundation of an action. These are called privileged communications, that is the party making them, has, in law or in morals, the right to make them; but, if he acted in bad faith, and used his privilege as a cloak, under which to cover his malice, the communication ceases to be a privileged one, and he must answer the consequences. And whenever, in an action for slander, the defence rests upon the question of express malice, on the part of the defendant, the jury are the sole triers. We have found no case exactly like this, but several, in which the principles governing them were similar to those arising here. In *Wright* v. *Woodgale*, 2 C. M. & R. 513, and also reported in 1 T. & G. 12, Baron PARKE observed, "the proper meaning of a privileged communication, is only this: that the occasion, on which the communication was made rebuts the inference, *prima facie*, arising from a statement prejudicial to the character of the plaintiff." The same eminent Judge in the case of *Cockayne* and *Hodgkisson*, 5 Car. & P. 543, observes, that "whenever the writer of a libel is acting under any duty legal, or *moral*, towards the person to whom he writes, his communication is a privileged one;" and no action, says *Mr. Stephens*, will lie for what is there written, unless the writer is actuated by malice. 2 *Stephen's N. P.* 22, 25. So, in the case, *Story* & *Challands*, 8 Car. & Pay. 234, it was ruled by the Court, that a communication by letter, made by a son-in-law to his mother-in-law, respecting her proposed marriage with the plaintiff and containing imputations upon him, though volunteered, was privileged, from the moral obligation resting upon him to protect her from injury. Many other cases are cited by Mr. Stephens to the same purpose. Was the communication made by Mrs. Marsh to Sally Adcock a privileged one? She was not connected

with her by any ties of consanguinity, nor had she any personal interest in the matter; nor was it necessary in order to her protection, that the duty she was discharging should have been a legal one. Was it a moral one? Can there be a doubt? What higher moral duty than to warn the young, to guard the innocent, to direct the unwary? The step mother of Sally Adcock was believed by Mrs. Marsh to be an impure woman, whether justly or not, is not now the question; and in compliance with the request of the departed mother, she made the communication to the daughter. What more perilous situation could the child of her friend be placed in? Daily exposed to the contaminating society of a woman, loose in her morals, whose position invested her with a commanding influence over her, if the time and the occasion ever could come, when, obeying the voice of duty, she was to warn the witness of her danger, it had come. Nor could the fact, that the individual, against whose society she was warned, was her step mother, change in the least the obligation of the defendant; the danger to the safety of the witness was by the connection increased in a ten-fold degree, and the obligation on the defendant increased in proportion. It will be recollected, that, in the preceding remarks, we do not, in the most remote manner, mean to be understood to say or intimate, that there was just cause for the opinion, which Mrs. Marsh entertained of Mrs. Adcock; it is not pretended. All we intend, all we mean is, that Mrs. Marsh, holding, honestly, these opinions of Mrs. Adcock, was, by the law, justified in making them known to Sally Adcock; and that her communication so made, was what is termed, a privileged one. And we farther hold, that without any request from the mother, she would, under the other circumstances, have been justified. When, however, a communication is shown to be a privileged one, as flowing from a legal or moral obligation, the plaintiff may if he can, prove that it was not made in good

faith, but from malice. If he succeed in doing so, it is stripped of the protection of the law, and ceases to be privileged. The rule was adopted for the protection of good morals, and must not be perverted to the purposes of vice. But it is the duty of the plaintiff to prove this malice by competent evidence, and it then becomes a question of fact, for the jury. It is their province to say, whether the defendant, in making the communication, has acted *bona fide*, intending honestly to discharge a duty, or whether he has acted maliciously intending to do an injury to the plaintiff. *Patterson* v. *Jones*, 15th Com. L. R. 305. *Coxhead* v. *Richards*, 52 do. 568. Enough appears in the case, to authorise the Court to treat the communication to the daughter, as so far privileged, as to leave the question of good or bad faith, with which it was made, to the jury, especially as the defendant had desired the witness to inform her father that she might have the benefit of his advice. We think, therefore, it ought to have been put to the jury, to say, whether the words were spoken to the witness, for the honest purpose of warning an innocent young woman, of the danger to her reputation and morals, from a longer intimate association with one, whom the speaker believed to be a lewd woman, or for the malicious purpose, of aspersing her character. Such ought to have been the instruction given to the jury. His Honor however charged, that there was *no evidence* to rebut the malice implied in law, by speaking of the words. In this we think he erred. If he meant, what the words imply, that there was *no such evidence*, he was manifestly wrong, for it existed in the relation in which the parties, the witness and the defendant, stood towards each other, as stated in the case. If he meant there was not sufficient evidence, then he erred, in taking upon himself the decision of a matter of fact.

It is further urged by the defendant, that the Court erred, in permitting evidence to go to the jury, as to his circumstances. On this question, we concur with his Honor

Such evidence has been repeatedly admitted in actions of *tort*, to influence the damages to be given. In 2 *Star. Ev.* 496, it is laid down, that, in an action for malicious prosecution, the plaintiff, with a view to vindictive damages, may give in evidence the length of time he was imprisoned, his situation in life, and *his circumstances*. He may also given in evidence the circumstances of the defendant. *Bul. N. P*, 13. 2 *St. Ev.* 252.

The only case, we can find to the contrary is that of *James* v. *Biddington*, 25 Com. L. R. 553. 8 Car. & Pay. 589; there, ALDERSON, Baron, ruled out the testimony. He cites no authority for his opinion, and admits it had often been received. The case, which was for criminal conversation, does not show what were the attendant circumstances. In such actions, vindictive damages are not necessaarily given: they are dependant on the circumstances attending the transaction. If the plaintiff, by his negligence, has contributed to his own dishonour; if he and his wife lived unhappily together, and in other cases of a similar character, he is not entitled to vindictive damages, and the evidence would not be admissible. Such may have been the case, upon which we are commenting. Be that, however as it may, we prefer the opinions previously given as more in accordance with justice and right reason. The object of the law in giving damages, in actions of *tort* is to compensate the plaintiff for the injury he has sustained; and in giving vindictive damages to punish the defendant for his iniquitous conduct. In neither case ought justice to be lost sight of, and in neither case does the law contemplate or intend the ruin of the defendant. Without a knowledge of his circumstances, the jury might give damages against him utterly ruinous, and such, as against another of greater property, would not be felt.

For the error pointed out, the judgment must be reversed, and a *venire de novo* awarded.

PER CURIAM. Judgment reversed and *venire de novo*.

HENRIETTA HOWARD *vs.* ROBERT THOMPSON.

A guardian of a lunatic may, by order of the County Court, rightfully sell the personal property of his ward for the payment of his debts, provided there be no fraud in the proceeding.

The cases of *Harris* v. *Richardson*, 4 Dev. 279, and of *Leary* v. *Fletcher*, 1 Ired. 259, cited and approved.

Appeal from the Superior Court of Law of Orange County, at a Special Term in December 1847, his Honor Judge BATTLE presiding.

This was an action of detinue for seven slaves, to which the defendant pleaded the general issue and statute of limitations. It was tried at the Special Term of Orange County in December last, when the plaintiff proved, that she was entitled to the slaves in controversy under the will of her father; that they were in the possession of the defendant and had been demanded of him, before the commencemont of the suit. She then produced the records of the County Court of Orange, at November Term, 1845, showing that she had been regularly declared a lunatic, and that one Thomas D. Oldham had been appointed her guardian. The defendant claimed the slaves, under a sale made by one Stephen Glass, as the guardian of the plaintiff, in November 1827. He then produced the records of the County Court of Orange, at August term, 1828, showing that the plaintiff was then declared a lunatic and the said Glass appointed her guardian, and he also produced the records of August term, 1827, upon which appeared the following order:

"Ordered, that Stephen Glass, Guardian &c. have leave to sell Patience and her three children, the pro-

perty of Ritta Howard, his ward, for the purpose of paying debts."

He then introduced witnesses, to show that Glass, the guardian, sold the slaves mentioned in the order, at public sale in November 1827, when one Richard Howard became the purchaser, and afterwards sold them to him: and that he had kept them and their increase ever since, claiming them as his own. The fairness of the sale made by the guardian was attempted to be impeached by the plaintiff, and testimony was introduced for that purpose, but it is unnecessary to state it, as the case was decided upon another ground. The defendant contended that he acquired a good title to the slaves, under the sale made by the plaintiff's guardian, Glass, to Richard Howard and his purchase from Howard; but that, if his title had been originally defective, it was made good by so many years of adverse possession. He also objected that the action could not be sustained in the name of the plaintiff alone, without joining her guardian or some person as next friend.

For the plaintiff it was insisted, that the action was properly brought in her name, and that, if it were not so, the objection could not be taken upon the trial after a plea in bar; that the defendant had not acquired any title under his purchase: 1st. Because the County Court had no power to make an order for the sale of the slaves. 2nd. That if it had, it was a special authority, which must be strictly pursued, by the Court's ascertaining the debts for which the sale was to be made, which it was contended, had not been done in this case. The Court charged the jury that the County Court had no power to make the order in question, because it had not pursued the special authority conferred upon it, and that the defendant had therefore acquired no title to the slaves under his purchase from the vendee of the guardian; that the statute of limitations had no operation, because

the plaintiff was a lunatic during the whole time of the defendant's possession, and that the action could be sustained in the name of the plaintiff alone. Under this charge the plaintiff had a verdict and judgment, and the defendant appealed.

No counsel for the defendant.

Waddell and *Norwood*, for the plaintiff.

BATTLE, J. When this case was on trial before me while presiding in the Court below, the main objection to the title set up by the defendant, under the sale made by the plaintiff's first guardian, Glass, was that the authority conferred upon the County Courts by the acts of 1784 and 1801 (1 *Rev. Stat. ch.* 57, *sec.* 1 and 2) was a special one, which must be strictly pursued; and that the County Court of Orange, in making the order in question, had exceeded the authority, with which it was invested; and that therefore the order and all the proceedings under it were void. In support of this position, the counsel for the plaintiff cited and relied upon, the case of *Leary* v. *Fletcher*, 1 Ired. Rep. 259, in which it was held that the County Court, in proceeding under the act of 1789 (1 *Rev. Stat. ch.* 62, *sec.* 11) authorising an order to issue to a guardian empowering him to sell the property of his ward, for payment of the debts of the ward, must first ascertain that there are debts due by the ward, which render the sale of the property expedient; and that the Court must also select the part or parts of his property, which can be disposed of, with least injury to the ward, and that, therefore, an order in the following words: "Ordered that A. W. the guardian, have leave to sell as much of the lands of S. M. deceased, as will satisfy the debts against said deceased's estate" is unauthorised and void, and a purchaser of the land under a sale, made by the guardian in pursuance of such order, acquires no title. The difference between the general power of the County Courts, acting

quoad hoc as Courts of Chancery, by virtue of the authority conferred upon them by the General Assembly, in ordering the sale of the *real* estates of wards by their guardians, and their power in ordering the sale of *personal* property was not distinctly presented to the Court in the reply of the defendant's counsel, nor was the case, *Harris* v. *Richardson*, 4 Dev. Rep. 279, brought to its notice. Upon seeing the latter case, and considering the principles, upon which it was decided, I am satisfied that I erred in my charge to the jury upon the question now under consideration.

The facts of that case were that certain slaves had been sold by the guardian of the plaintiff, Susan Harris, under an order of the County Court, made upon his petition, which set forth that his ward had no other property, than the said slaves, and that they were all expensive to her. The defendant claimed under a sale made by the guardian, and the plaintiff obtained a verdict and judgment in the Court below. But this Court reversed the judgment and granted a new trial, holding that a guardian appointed by the Court of Chancery might, by order of the Court, rightfully sell the *personal* property of his ward; and that the Act of 1762, 1 Rev. Stat. ch. 54, confers the same power on the County Courts, so that a guardian, appointed by the latter, might, under a similar order, also sell the personal estate of his ward. The Act of 1801, above referred to, gives to the County Courts the power to appoint guardians of lunatics and idiots, and invests the guardians so appointed with "the same powers to all intents, constructions and purposes" as have been conferred upon guardians of orphans, appointed by the County Courts by virtue of the Act of 1762. It follows from this, that the case of *Harris* v. *Richardson*, is a direct authority in favor of the order and sale, under which the defendant claims; and we hold, that, if the sale was made fairly and in good faith by his vendor, he acquired by it a good title to the slaves now sued for.

We think it proper, however, to repeat the remarks, made by the Court in the case just referred to, that "such sales are so unusual—the occasions, which would justify them, are so rare—the dangers of imposition on the Court by misrepresentations of the guardian and of corrupt combinations between him and the ostensible purchasers so obvious, that the vigilance of Courts and jurors should be extended in detecting any fraud, which may infect the proceeding." The judgment must be reversed and a *venire de novo* awarded.

PER CURIAM. Judgment reversed and a *venire de novo*.

EMSLEY DONNELL & AL. vs. WILLIAM T. SHIELDS & AL.

Where there are two or more parties, defendants in an action of trover, an appeal by less than the whole number of parties cannot be supported, although they pleaded severally. If the verdict is against all, the judgment must necessarily be against all for the whole sum found in damages.

The cases of *Gilliam* v. *Hicks*, 4 Dev. 217, *Dunns* v. *Jones*, 4 Dev. & Bat. 154, *Stiner* v. *Cawthorn*, 4 Dev. & Bat. 501, and *State* v. *The Justices of Moore*, 2 Ired. 430, cited and approved.

Appeal from the Superior Court of Law of Guilford County, at the Fall Term, 1847, his Honor Judge BAILEY presiding.

This was an action of trover brought by the plaintiffs against James M. Patterson and three other defendants, to recover damages for the conversion by them of several slaves. The defendant pleaded severally the general issue, not guilty, and upon the trial of the issues in the Superior Court of law, at Guilford, on the spring circuit of 1848, the jury found the defendants "severally guilty," and assessed the plaintiff's damages to $2,048 60, and judgment was rendered that the plaintiffs recover, &c. From this judgment the defendant, Patterson, alone, appealed to the Superior Court, where the counsel for the plaintiff moved to dismiss the appeal, for the reason that the other defendants had not joined in it.

Kerr and *Iredell*, for the plaintiffs.
Waddell and *J. T. Morehead*, for the defendants.

BATTLE, J. Upon the direct authority of the cases of *Gilliam* v. *Hicks*, 4 Dev. Rep. 217, and *Dunns, McIlvaine*, and *Brownley* v. *Jones*, 4 Dev. and Bat. Rep. 154, and for the reasons therein given, which it is unnecessary for us to repeat, we are bound to allow the motion made by the plaintiffs' counsel, and to dismiss the defendants' appeal. It is true that the defendants, in the Court below, pleaded severally not guilty, and the jury found them severally guilty, yet the damages assessed were for one entire sum against all, as they ought to have been (*Sir John Haydan's case*, 11 Coke's Rep. 5. *Lawfield* v. *Brancroft*, Strange's Rep. 910,) and the judgment thereon was of course a joint one against all. Nor can the cases of *Stiner* v. *Cawthorn*, 4 Dev. and Bat. Rep. 501 and *The State* v. *Justices of Moore*, 2 Iredell's Rep. 480, cited for the defendant, help him. Both those cases fully recognise the authority of *Hicks* v. *Gilliam*, and *Dunns, McIlvaine and Brownley* v. *Jones*, and are decided upon

principles not applicable to them, nor to this case. The motion to dismiss the appeal from this Court in *Stiner* v. *Cawthorn*, was refused upon the ground, that though there were other defendants in the County Court, yet as no motion was made to dismiss Cawthorn's appeal from the Superior Court, and that Court did, in fact, entertain jurisdiction of the case, and gave judgment against him alone, his appeal to the Supreme Court was proper, and could not be dismissed from that Court. The other case of *The State* v. *The Justices of Moore*, was put upon the intelligible and proper ground, that the suit against the Justices, was not against them as several persons, acting as individuals, but as a corporate body, acting through the medium of a majority of its members. The judgment was therefore against them in the same capacity, and an appeal from it by a majority was in effect, an appeal by the whole body.

PER CURIAM. The appeal dismissed.

DEN ON DEMISE OF THOMAS G. WATKINS & AL. vs. ANDREW FLORA.

A testator devised certain lands to his wife during her widowhood, and after her marriage or death, to his wife's heirs by consanguinity, with the exception of one sister, Elizabeth. The wife was pregnant at the time of making the will, though unknown to the testator. Afterwards this child was born, and died in the life-time of its mother. The mother then died, leaving brothers and sisters, her only heirs. *Held*, that on the birth of the child, the remainder vested in him, to the exclusion of the brothers and sisters of the wife, and on his death vested in his heirs at law.

The construction of a will must be upon the will itself, and cannot be controlled by parol proof of an intention, as to particular persons to take under the devise, for in effect that would be to make the will by parol; though the construction may be aided by evidence of the state of the family.

A devise to one person cannot be color of title to another, claiming adversely to the devisee.

The cases of *Gibbons* v. *Duun*, 1 Dev. and Bat. 446, and *Montgomery* v. *Wynns*, 4 Dev. & Bat. 527, cited and approved.

Appeal from the Superior Court of Law of Currituck County, at the Fall Term, 1847, his Honor Judge Dick presiding.

Henry Bright was seized in fee of the premises in the declaration described, and on the 15th April, 1836, he made his will and therein devised and bequeathed as follows:

He directed a tract of land and three slaves to be sold and the proceeds to be applied to the payment of his debts, and the surplus, if any, he gave to his wife, Polly. The will then proceeds thus: "I lend the tract of land I now live on" being that in dispute "unto my wife during the time she remains my widow. I also lend negro woman Chary and child, Pleasant, Major, Sylvester, Ann, and Amanda to my wife Polly, as long as she lives my

widow. I lend the use and benefit of all my stock of every denomination, all the produce of every kind, all the house-hold and kitchen furniture, and farming utensils of every description to my said wife as long as she remains my widow. Immediately after the marriage of my widow, or directly after the death of my wife Polly, I give and hequeath all the before mentioned estates within doors and without, to my loving wife Polly's heirs by consanguinity, with the exception of Elizabeth McPherson: and I give and bequeath to her one dollar. I appoint my wife Polly whole and sole excutrix of this my will."

The testator died on the 15th May, 1836, and his will was proved on the 4th Monday of that month, and his wife then entered her dissent to it. The testator or his wife had no issue born at the making of the will; but she was at the time pregnant. In August 1836, the widow intermarried with the defendant, Flora, and she was afterwards delivered of the child, of which she was pregnant in the testator's life time; and the child lived about six months and died. At that time the defendant was in possession of the land, and dower was allotted to his wife in one third of it, which he claimed in her right. The defendant afterwards made a parol contract for the purchase of the reversion of the third allotted for the dower, and of the other two-thirds in possession in fee, from Narcissa Halstead, and Rachel, Solomon, and Robert Charlton. They were, together with said Elizabeth McPherson, the brothers and sisters of the testator's wife, and were living at the making of the will, the death of the testator, and the marriage of his widow. Under those titles and a deed from Solomon Charlton for his share of the premises, executed about two years before the suit, the defendant held the premises for about ten years before the commencement of the action, claiming in right of his wife, or under her brothers and sisters, for himself. Mrs. Flora died shortly before this suit;

and the lessors of the plaintiff are the heirs at law, of the testator, and of the posthumous child *ex parte paterna*.

On the trial, the foregoing facts were agreed by the parties. Then the counsel for the defendant offered furthermore to prove by witnesses, that the testator, at the time of making his will, was ignorant of the pregnancy of his wife, and that it was his intention, by his will, to give the premises to the said brothers and sisters of his wife (except Elizabeth McPherson) after the death or marriage of his said wife. But the Court rejected the evidence; and upon the facts stated was of opinion with the plaintiff, and a verdict and judgment were rendered accordingly, and the defendant appealed.

Heath and *J. H. Bryan*, for the plaintiffs.
Iredell, for the defendant.

Ruffin, C. J. A title at law cannot be set up for the afterborn child, under the Act of 1808, in favor of children born after the making of their parent's will. For, if the child took by the will, it was provided for by the father, and the case would not be within the Act; and, if the child did not take under the devise, but the mother and her brothers and sisters took the whole property, then the proceedings were not had, which the Act prescribes for vesting the seizin in the child.

Upon the construction of the will, it is contended for the defendant, either that the testator's widow took the fee, or that it was limited over in remainder, upon the death or marriage of the wife, to her brothers and sisters, except Mrs. McPherson. That depends upon the operation of the words, "my wife's heirs by consanguinity." We do not think they gave the inheritance to the wife. It is plain, from the testator's giving every thing he had to his wife and her blood, that he did not intend his estate to go to his own family, as such. Then, as he gives the property over, upon the marriage of his wife,

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as well as upon her death, to her heirs by consanguinity, there would seem to be a pretty strong inference, that the testator did not mean those persons to take, in the quality of his wife's heirs, that is, by succession after his death; because then upon the marriage of the wife, the whole property would go to the testator's own heirs and next of kin, for the interval between the wife's marriage and death. Perhaps that of itself would not be sufficient to prevent the application of the rule, in *Shelly's case* to this devise. But when to those considerations is added this other, that the testator expressly excepts from the wife's heirs, to whom the limitation is made, a certain sister of the wife, one cannot be mistaken in saying, that the words were not used as words of limitation of an estate to the wife, but as words of purchase, denoting who were to take in remainder after the wife. For by the exception it is manifest, that the sister was understood by the testator to be within the general terms of description and that she might take, but for the exception. If she did take, it would be as one of the wife's heirs, and others in equal degree must in like manner, come in under the same words. But by excluding that sister, and leaving the others in equal degree to take, the testator shews that he did not mean them to take as heirs, by descent from his wife, since the course of descent cannot thus be altered, by admitting some, and excluding other heirs. The wife's estate therefore was only that expressly limited to her during life or widowhood, and the heirs took by purchase in remainder.

Then, the question is, who did take as purchasers under those words? There are no other persons, who can set up a claim, but the after-born child, and the other brothers and sister of the wife, besides Mrs. McPherson. Here it may be remarked, that the construction must be upon the will itself and cannot be controlled by parol proof, of an intention as to the particular persons to take under the devise; for in effect that would be to make the will by

parol. The question is not the abstract one, what the testator intended, but what was his meaning by the words used by him. The evidence as to the intention was therefore properly excluded. On the other hand, it has been decided, that the construction may be aided by evidence of the state of the family. *Gibbons* v. *Dunn*, 1 Dev. & Bat. 446. Hence it was competent to prove, that the wife was only pregnant at the making of the will, and, perhaps, that the testator did not know of it. But we do not look into the latter point, because, for the reasons that will presently appear, in our opinion, his ignorance of the fact could not affect the devise; and therefore the exclusion of that evidence was of no consequence.

Between the two sets of claimants, the wife's afterborn child, and her brothers and sisters, the opinion of the Court is for the former. The testator uses words, "my wife's heirs by consanguinity," which embrace the child, as well, in case it was out of the way, as they do the brothers and sisters. The child being in *ventre matris* was *in rerum natura* capable of taking by descent, and also by purchase under the description of "child" or "heir" of another. *Doe* v. *Clark*, 2 H. Bl. 399. *Wallis* v. *Hodgson*, 2 Atk. 117. *Thelluson* v. *Woodford*, 4 Ves. 227. Then, what is to exclude the child? It is to be remembered, that whoever takes, does so as purchaser; and that, as by the marriage of the wife the remainder would fall into possession during her life, the person, who takes, does not take as being the heir absolutely of the wife, but only as her heir apparent or presumptive. The brothers and sisters claim as filling the latter character, while the child was undoubtedly heir apparent. It is asked again, what is to exclude it? If the testator knew that it was in *ventre matris*, the defendant gives up the argument. But it is insisted that he did not know it; and the presumption is very cogent on the face of the will, that he did not, and it is thence inferred, that the testator could not mean the child to take,

and that he did mean the brothers and sisters to do so, as heirs presumptive. There can be but little doubt, we think, that the testator expected the brothers and sisters to take, as he then naturally looked upon them as the wife's nearest relations, and the exclusion of one of them shows that they were in his view. But that is not the whole enquiry. We are to consider, not only whether he intended those persons might or should take, but whether they, and no one else, should. How can those broad words, "my wife's heirs" be narrowed down to three or four particular persons, though those persons may have been in the testator's contemplation? The argument for the defendant is founded on the state of the testator's knowledge at the time he used this language; and thence is deduced his expectaion, and, thence, again, his intention, on this subject. The position is, that he meant the brothers and sisters, because he knew them. It would follow that he could only mean those brothers and sisters, whom he did know. But suppose the words had been "my wife's brothers and sisters," and there had been one of whom the testator had no knowledge, it would be impossible to exclude one that came so expressly within the description. Again, as these brothers and sisters say, that they take under the description of the "wife's heirs," for the same reason another brother or sister, though unknown to the testator, must also take under the same description. Suppose further, that after the making of the will all the brothers and sisters had died in the lifetime of the testator, leaving children. The devise would certainly not fail, but those children would come in, as answering the description, when the will took effect and vested the estate. The gift is not to particular persons, as the sole objects of the testator's bounty, but to a class of persons; and whoever came within it when the will took effect, and the estate vested, take under it, and none others. So, the child of the wife took under this descrip-

tion; because though unknown to the testator, it alone answered the description: for it was in being when the the will was made, and when the testator died and the wife married, and was heir apparent; and thereby the brothers and sisters ceased to be heirs presumptive. The exclusion of one of the sisters, though sufficient to show that, if the brothers and other sisters took at all, they were to take as purchasers, does not prove that they were to take at all events, to the exclusion of all others. Whenever they should take, as being the heirs presumptive of the wife, Mrs. McPherson, though in equal degree, should not take. But it would still be a question between those brothers and sisters, and a child of the wife, then in *ventre matris*, which most nearly answered the description of "heir of the wife," and certainly, the latter did, as being her heir apparent.

The lessors of the plaintiff are therefore entitled to the premises as heirs of the afterborn child, who took the fee. The defendant's possession was without color of title, and therefore is not a bar to the right of entry. He took a deed from only one of his vendors, and that, only two years before the suit. If, indeed, they had color of title, then the defendant's possession under them would have been sufficient. But, as was intimated in *Montgomery* v. *Wynns*, 4 Dev. & Bat. 527, we think the will cannot be color of title to the brothers and sisters, however doubtful the construction; for it is impossible that a devise to one person, can be color of title to another, claiming adversely to the devise.

PER CURIAM. Judgment affirmed.

THE STATE TO THE USE OF CHARLES BALDWIN vs. ASA JOHNSTON & AL.

Where an administratrator dies without having finally administered the estate of his intestate, an action will not lie by one of the next of kin for his share of the estate against *his* administrator, but must be brought by the administrator *de bonis non* of the original intestate.

The case of *Taylor* v. *Brooks*, 4 Dev. & Bat. 143, cited and approved.

Appeal from the Superior Court of Law of Washington County, at the Spring Term, 1848, his Honor Judge SETTLE presiding.

James Baldwin died in the year —— intestate, without issue, leaving a widow and one brother, the relator, who were entitled to his personal property. Letters of administraton were duly granted to James Bennett, who entered into bond, with the defendants, as his sureties. The personal estate of Baldwin was large, and the administrator possessed himself of it, and after paying the debts of his intestate, and the widow her third, had, in his hands a considerable sum, unadministered. Bennett died, and this action is brought on the administration bond, by the brother, the relator, to recover the money so remaining in the hands of the administrator.

His Honor was of opinion that the relator could not maintain the action, but that it ought to have been brought by the administrator *de bonis non*. In submission to this opinion, the plaintiff took a non-suit, and a motion for a new trial being refused, appealed to this Court.

Heath, for the plaintiff.
Iredell, for the defendants.

NASH, J. We see no reason to doubt the correctness of the judgment appealed from. Upon the estate of every intestate there must be an administration, in order to its due and proper settlement. The administrator is the personal representative of the deceased, and upon him devolves the duty and reponsibility of collecting the assetts, and paying the debts and making distribution. He alone is recognised as legally entitled to the assets, and to him must the creditors and next of kin look. If he dies before these ends are attained, an administrator *de bonis non* must be appointed, and to him the like rights, duties, and responsibilities attach; and so on, as often as the representative dies without closing his administration, and the action at law, to collect the unadministered assets, must be brought in the name of the administrator *de bonis non*, and not in that of the next of kin, *Taylor* v. *Brooks* 4 Dev. & Bat. 143.

We agree with his Honor, that the relator cannot maintain this action.

PER CURIAM. Judgment affirmed.

JONATHAN B. CAPEHART *vs.* A. H. JONES, EX'R, &c.

A. contracted with B., a fisherman, that he would pay him so much *per annum*, for a certain number of years, for the offal of the fishery, and then it was stipulated, that A. should have the offal as long as the fishery was continued. *Held* that, by no proper construction of this contract, could A. be entitled, after the expiration of the said period and after the death of B. and the sale of the premises for division, to demand damages for the non-delivery of the offal.

Appeal from the Superior Court of Law of Bertie County, at the Spring Term, 1848, his Honor Judge SETTLE presiding.

This was an action of covenant upon the following instrument, to-wit:

"We, William Bryan, and Henry L. Williams, fishing under the firm of Bryan and Williams, and Jonathan B. Capehart, have made the following bargain, viz: The said Capehart agrees to give the said Bryan and Williams three hundred dollars for the offal from their fishery at the head of the Albemarle Sound, payable as follows, viz: one hundred dollars on the 1st day of January, 1834, and one hundred dollars on the 1st day of January, 1835, and one hundred dollars on the 1st day of January, 1836, provided the said Bryan and Williams have the fishery fished every year, and catch five hundred barrels of fish, a fishing season; but should they fail to catch five hundred barrels of fish, then the said Capehart is only to pay for the offal in proportion, and should they fail to fish previous to the last payment, then the said Capehart is not to pay any more. In witness wnereof, we have affixed our hands and seals, this 9th day of August, 1831.

It is further understood the said Capehart, his heirs and assigns are to have the offal of the said fishery as long as it is fished."

Witness, (Seal.)

L. S. Webb to Williams' Seal and to Capehart's Seal. HENRY L. WILLIAMS, (Seal.)

J. B. CAPEHART, (Seal.)

A. Oxly to do.

The breach of the covenant assigned by the plaintiff was the failure of the defendant's testator, Williams, to permit him to take the offal from the fishery, mentioned in the instrument, during the year 1846. The defendant pleaded the general issue and conditions performed and not broken.

The jury under the charge of the Court rendered a verdict for the plaintiff and from the judgment thereon the defendant appealed.

Upon the trial some testimony was given in relation to the execution of the instrument, but it is unnecessary to state it, as the opinion of the Court is confined to the question arising upon the construction of the covenant. It was proved that Bryan and Williams carried on the business of fishing every year, from the time when their contract with the plaintiff was entered into, until the death of Bryan in the year 1843, and that the plaintiff paid the $300, as agreed upon, and took the offal from the fishery up to that time. After the death of Bryan, the land and fishery were sold under a decree of the Court of Equity for Bertie County, upon the petition of the said Bryan's heirs and Williams, when it was purchased by one Abraham Riddick, who subsequently sold to Kader Biggs. It was proved further, that the fishery was kept up and the fishing business carried on during the year 1845, by Williams and Riddick, and that Williams recognized the right of the plaintiff to the offal during that year. But Biggs took possession of the land and fishery, and carried on

the business of fishing himself, during the year 1846, and refused to let the plaintiff have the offal of that season, for which he brought this action against Williams, which, upon his death in the Fall of 1846, was revived against his executor.

The defendant's counsel contended, that, according to the proper construction of the contract, the plaintiff was entitled to have the offal of the fishery only so long as it was fished by Bryan and Williams, but the presiding Judge was of a different opinion, and, under his instructions to the jury, the plaintiff obtained a verdict for the value of the offal during the year 1846.

P. H. Winston, Jr., for the plaintiff.
W. N. H. Smith, for the defendant.

BATTLE, J. The construction, placed upon the covenant in question by the presiding Judge, makes it operate so unequally upon the different parties, and produces effects so disastrous to the estate of one of them, that nothing but the plainest language in the instrument could induce us to adopt it. According to that construction, the plaintiff will be entitled to recover damages from the defendant, during an indefinite number of years, for not permitting him to have the offal from the fishery mentioned in the covenant, while it shall be fished, although it may become the property of another person, and the estate of the defendant's testator may have no interest in it, and derive no profit from it. Surely the parties to the contract, supposing them to be men of ordinary understanding, never contemplated such a result; and we think that their contract, when fairly interpreted, does not lead to it. The covenant was executed on the 9th of August 1831, and stipulates that for the sum of $300, payable by three equal annual instalments, commencing on the 1st day of January, 1834, the plaintiff shall have all the offal from the fisheries of Bryan and the defen-

dant's testator, provided they catch as many as five hundred barrels of fish *per annum;* but if they catch less than that number, then the plaintiff is to pay only in proportion; and, if they fail to fish previous to the last payment, then he is to pay no more. So far, the contract seems plain; and to be nothing more than a purchase by the plaintiff, at an agreed price, and upon certain specified terms, of all the offal from the fishery of the other parties up to the close of the year 1836. And there the contract seems at the time to have ended, for the attestation clause immediately follows. But after that is added, the clause, under which the plaintiff claims to recover in this action. It states that, "It is further understood the said Capehart is to have the offal of the said fishery as long as it is fished." Fished by whom? Certainly by the owners of the fishery, who are contracting to let the plaintiff have the offal. That is the natural construction; and it is the only reasonable and fair one. For if the construction, contended for by the plaintiff, be adopted, it will have the extraordinary effect, in the events which have happened, of giving him something like a perpetual annuity of the yearly value of the offal out of the estate of the defendant's testator. We think that the contract terminated, at the latest, when Bryan and Williams ceased to be the owners of the fishery, and that the recognition of it by Williams, while he and Riddick were fishing in 1845, was founded in a clear mistake of its true meaning and intent.

PER CURIAM. Judgment reversed.

JOHN A. McLEOD *vs.* JOHN OATES.

An action of replevin will not lie, either at the common law or under our statute, against an officer who seizes property by virtue of an execution.

Appeal from the Superior Court of Law of Moore County, at the Spring Term, 1848, his Honor Judge BAILEY presiding.

This is an action of replevin for a slave named Ephraim. The defendant entered into bond according to the statute, with condition to perform the final judgment, and pleaded *non cepit*, and also avowed the taking under a *fieri facias*, isued by a Justice of the Peace on a judgment obtained by J. B. K. against Neil McLeod for $51 with interest &c. which was delivered to the defendant, he being a Constable &c. and that by virtue thereof the defendant on &c. seized the slave as the proper goods and chattels of the said Neil, and then in the possession of the said Neil, to satisfy &c. Whereupon he prayed judgment &c. The plaintiff pleaded that the slave was his property and not that of Neil McLeod.

On the trial, evidence was given for the plaintiff, that on the 30th of August, 1839, Neil McLeod conveyed the negro to the plaintiff by deed, which purported to be made in consideration of $600 then paid. Much evidence was given, tending on the part of the plaintiff to show, that Neil McLeod, who was the plaintiff's father, owed him $600 for money, paid or agreed to be paid, for him, before or at the time of the conveyance; and tending on the part of the defendant to establish, that the conveyance was voluntary or nearly so, and was intended to defraud the father's creditors: on which several

questions were made by the parties. But as the opinion of the Court does not proceed upon that part of the case, it is unnecessary to state the points or the facts particularly, further than to say, that, after the execution of the bill of sale to the plaintiff, his father continued in possession of the negro, and he was in possession of him on the 2nd of August, 1844, when the defendant took him under the execution mentioned in the avowry.

The counsel for the defendant insisted, first, that the conveyance to the plaintiff was fraudulent and void as against creditors; and secondly, that the plaintiff could not maintain this action of replevin against him. The Court left the question of the consideration to the jury, with directions, that if they found that the plaintiff had paid or or agreed to pay money for his father to the full value of the slave, the conveyance to him was not fraudulent, but valid in law; and that if the plaintiff had, at the time of the taking by the defendant, the right to the immediate possession of the slave, then he was entitled to recover in the action. The jury found for the plaintiff, and assessed the value of the slave at $600, and the damages at $178; and there was judgment accordingly for the value to be discharged &c.; and for $356 damages, being double the amount assessed by the jury; and the defendant appealed.

D. Reid and *Mendenhall*, for the plaintiff.
Kelly, for the defendant.

Ruffin, C. J. Upon the question of fraud we think it only necessary to remark, that it seems singular, that it should have been left to the jury, without laying the proper stress on the long continued possession of the father after making the deed, as a circumstance tending to show that the conveyance was upon a secret trust for the father, and especially as being deceptive to creditors by keeping up a false credit for the father. But although

the possession is not further adverted to as an element of fraud, avoiding the plaintiff's title, yet it is material, perhaps, on the other point, made at the trial, as to the plaintiff's right to bring replevin.

The old authorities all agree, that goods taken in execution from a Court of record are not repleviable. Com. Dig. *Replevin*, D. Indeed, the sheriff subjects himself to an attachment by making replevin of them. *Bul. N. P.* 53. The same law holds of warrants of distress on convictions, and process of execution on judgments given by magistrates, having jurisdiction. *Rex* v. *Monkhead*, 2 Str. 1184. *Wilson* v. *Miller*, 1 Brod. & Bing. 57. The reasons for this are of that imperative nature, that make the rule indispensable to the administration of the law. Execution has been called the end of the law. But it will be only the beginning, and there would be no end of the law, if after a person has established his right by judgment, the defendant's effects may be rescued from the execution at his will by suing out a writ of replevin. No case is found in England of replevin maintained by any person for goods, taken by virtue of an execution against the plaintiff in replevin or any other person. In New York it was held in *Thompson* v. *Button*, 14 John. 84, that goods of A. taken out of the possession of A. upon execution against the property of B. may be repleveid at the suit of A. but no authority was cited for the position, and the decision put expressly on the ground, that, by taking goods out of the possession of one person, upon execution against another, the officer undertakes to show, that they were the property of the defendant, in the execution; and the Court explicitly states the general pinciple, that goods taken in execution are in *custodia legis*, and "it would be repugnant to sound principles to permit them to be taken out of such custody, when the officer found them in and took them out of the possession of the defendant in execution." It is true

that a contrary rule is laid down by one of the Judges in *Clark* v. *Skinner*, 20 John. 465, who held the broad doctrine, that the principle only applied between the officer and the defendant in execution, and that a third person might replevy on his right of property, although the seizure was made while the thing was in the debtor's possession, provided only the plaintiff in replevin had the right to take possession, when the officer took it. That opinion was then extra-judicial, as the case was, that the officer took the things from the possession of the plaintiff's servant, while employed in his master's business, upon an execution against the servant. Therefore the actual possession, in a legal sense, was in the master and not the servant; and the former might have had trespass as well as trover for the taking, and on that ground the majority of the Judges rested their decision. Subsequently, indeed, the broader doctrine gained favour, and in the case of *Dunham* v. *Wicks*, 3 Wend. 280 it, was held by the Supreme Court, that every person, having the property, in goods and the right to reduce them to possession, may have the action against an officer, who takes them by execution out of the actual possession of the defendant in execution, notwithstanding an express recognition of the contrary doctrine by the same Court just one year before in *Judd* v. *Fox*, 9 Cowen 259. It may therefore, we suppose, be considered settled in that State. The extension of this action to the case, where one man's goods are taken upon execution against another, prevails also in Massachusetts; but upon much more legitimate grounds, than those on which it has been placed in New York. By a statute of 1789 it was there enacted, when any goods, of the value of more than $20, which are attached on mesne process, or taken in execution, are claimed by any person, other than the defendant in the suit, in which they are so taken or attached, such owner or other person may cause them to be replevied. It may be remarked

that the very passing of that act is inconsistent with the idea, that the common law gave the action in such cases; and Chief Justice PARSONS lays it down clearly, that it did not, *Ilsley* v. *Stubbs*, 5 Mass. Rep. 280. But after the act, the Courts in Massachsetts were obliged to sustain the action; for, although, the Chief Justice could not help remarking, the alteration of the common law had been productive of much practical inconvenience, yet it rested with the legislature to decide whether the common law should or should not be restored. With this declaration of the opinion and experience of a Judge, so learned and wise, before us, there ought to be little inclination to depart from the common law further than compelled by legislative authority. Accordingly in this State it was held, that the action of replevin would only lie by the common law, for a taking of goods from the possession of the plaintiff, and not upon a finding, though the owner was entitled to the immediate possession, *Cummings* v. *McGill*, No. Ca. T. R. 98. Therefore at common law we should hold, that this action would not lie, both because the goods, when taken, were not, legally, in the possession of the plaintiff, but actually in that of his father, not as his son's servant, and because the taking was by virtue of an execution against the property of the possessor.

It is contended, however, for the plaintiff, that the common law is altered here also by statute, as respects slaves, and that he is now entitled to the action. The act is that of 1828, Rev. St. ch. 101, and enacts, that writs of replevin for slaves shall be held and deemed to be sustainable against persons in possession of such slaves, in all cases where actions of detinue or trover are proper; provided, the plaintiff shall make oath, that he had been in the lawful possession of the slaves within two years preceding the issuing of the writ, and that he has been deprived of such posssession without his per-

mission or consent. Then follow various provisions with respect to the plaintiff's giving bond for the return of the slave, and for the defendant's giving bond for the performance of the judgment, if he chooses to keep possession during the suit. It is then enacted, that in case the plaintiff recover, the jury shall assess the value of the slave and the damages for the taking and detention, and that there shall be judgment for the value (to be discharged by the surrender of the slave, when kept by the defendant) and for double the damages assessed; and when not kept by the defendant, then for the double damages, and costs; and when the possession is delivered to the plaintiff, and the verdict is for the defendant, that then the damages, sustained by the defendant from being deprived of his property shall be assessed and judgment rendered therefor and the costs, against the plaintiff and his sureties. Such are the provisions of the act; and the argument is, that detinue or trover would be proper here, and therefore replevin will lie. The conclusion is not exactly logical: for in coming to it one loses sight of the proviso. That restrains the generality of the enacting clause, and by a necessary construction gives the action only when detinue or trover would lie for such an owner of a slave, as had been in lawful possession within two years before suit, and had been deprived of such possession without his consent. The action is still founded on an injury done to the possessor of a slave, though that injury need not be by "taking" out of the owner's actual possession, but may be by finding or enticement and then keeping the slave from him. It might therefore be well questioned, whether the plaintiff might not have been barred of his action, upon the ground, that his father, and not he, had the possession independent of the authority under which the defendant acted. But however that may be, and it is not necessary here to say, the Court is clearly of opinion, that it cannot be maintained upon a

taking under execution from the actual possession of the defendant in execution. The enacting words cannot be received in their full latitude, as that would produce the absurdity of allowing the debtor himself to bring replevin against the officer, because he might sue in trover. True, the act does not absolutely replevy the goods, but the defendant may retain them by giving bond. But the bond is to answer the judgment which is very severe, being not only for the slave or the value, and costs, but for double damages. Now the legislature could never have intended, that an officer, who acts on oath and is presumed to intend to act honestly and legally, should, by reason of some unobserved defect in process, be made liable beyond the actual damages arising from his acts. We may assume it certain then, that it was not meant thus by a side wind to prostrate the efficiency of final process, and to make the officer liable for extraordinary and arbitrary damages for an act, as he supposed, in the discharge of his duty. Therefore although the words be thus large, we conclude that the legislature did not intend, either that the defendant in execution might by this means regain the possession of his property, or subject the officer to such penalties, if by chance the process should prove defective, and to that extent, at least, the sense of the words must necessarily be limited. The same reasons operate with much the same force, when goods are taken on execution against one, to prevent another from having this action; and there are some in addition, arising out of the interest of the defendant in execution. Suppose A. and B. to have adverse claims to a slave in the possession of A. and the sheriff to take him under an execution against A. it cannot be conceived that the legislature meant that B. (although he may have been in possession within two years) should have replevin against the sheriff, in order to try the title between him and A., as the action is regulated by the statute,

rather than in the ordinary and adequate way by detinue, or trover, against A., or the sheriff, or the purchaser. The mischiefs of such a construction are so numerous and obvious, as to preclude it, unless absolutely forced on the Courts by the words and spirit of the act united. If the negro were delivered to the plaintiff in replevin, then the defendant in the execution would have his services during the period of litigation, and would have an uncertain and circuitous remedy for the damages sustained by him, supposing the title to be found for him. But if the sheriff gave bond and retained the slave, as perhaps after seizing he would become bound to do, the consequences would be still worse; for if the title were found for the plaintiff in replevin, he would get double damages, although the sheriff dare not, during the whole time, put the slave to work, and could not get any thing for maintaining him, while he kept him; and if the title were found against the plaintiff, yet the defendant in the execution and the true owner must have the services of the slave during the period and also pay for his maintenance or the sheriff keep him for nothing, after the day, on which he might have been sold, had there been no replevin. In the same manner, if a slave be attached, it is very certain that the former convenient and direct method of trying the title, by interpleading, will no longer be resorted to, when by replevin the plaintiff can get immediate possession or double damages against the officer. In every respect then the inconvenience of sustaining the action against an officer acting under legal process are so great as to satisfy the mind, that the act was passed *divero intuitu*, and that its proper construction will prevent its application to such cases. That is rendered yet more manifest by attending to the state of the law here in respect of this action, as lying against other persons, besides officers, and the reasons assigned in the preamble of the original act for passing it. They are, that slaves are fre-

quently *seduced* from the possession of their owners, under a pretence of right, by persons who were insolvent and intended to convey them beyond the jurisdiction of the Courts of this State, whereby great injury was produced to the *bona fide* holders of slaves, as the writs of sequestration, issuing from Courts of Equity in such cases, were tedious, expensive and frequently ineffectual; therefore it was enacted, that replevin may be sustained for slaves, where detinue or trover, were then proper. Detinue and trover were not effectual remedies in such cases, as those recited in the preamble, as the defendant was only held to bail, and might carry the slaves where he would, and upon judgment against him the only redress was against his body, and that would, probably, not produce satisfaction. It has already been noticed, that it had then recently been decided in *Cummings* v. *McGill*, that replevin would lie only on a *taking* from the owner, and not where the possession was obtained by finding, or, consequently, by seduction. It is also known, that many cases occurred of great hardship, where owners were defeated of the property, by dishonest and insolvent men seducing slaves and carrying them out of the State after having given bail. It was therefore manifestly proper and necessary to the purposes of justice, that, in such cases, notwithstanding the *mode of getting possession*, a remedy should be given in the common law Courts, whereby the owner could be better secured of regaining the slave, taken or seduced from him, or of recovering the value and exemplary damages. That such was the object of the act is to be inferred, too, from the provision, that, in case the plaintiff fail in the action, he is liable for only actual damages to the defendant, while, if the result of the suit be different, the defendant is made liable for double damages, no doubt for the reason of the unfairness of the means, whereby he obtained his possession. The object of the act was really then to give the

action, where it would not lie before, by reason, merely, of the mode by which the defendant got possession: and in sustaining the action in the cases of possession gained by "seduction," as well as by "taking," the whole purpose of the act is fulfilled, without extending, it, so as to embrace cases, in which the action was held not to lie by reason, that the goods though "taken" were taken under process. It was not intended to interfere with the law as it withheld the action, *on the ground of the authority*, under which the defendant got possession. Eor example; the action would not lie at common law, when the defendant came into possession by bailment from the plaintiff, though he may improperly refuse to return the goods, *Galloway* v. *Bird*, 4 Bing: 299; and the act did not intend to alter that; for it is express, that the plaintiff must have been deprived of the possession without his permission or consent. So it was not intended to interfere *with the authority of the law itself* to its officer, to seize the property in execution. That was not within the grievance cotemplated by the legislature; and therefore the Court holds, that the action will not lie against the defendant, and the judgment must be reversed and a *venire de novo* awarded.

Per Curiam. Judgment reversed and *venire de novo*.

THE STATE TO THE USE OF H. G. SPRUILL, ADM'R. vs. ASA JOHNSTON & AL.

Where assets have remained in the hands of an administrator for more than seven years unclaimed by the next of kin, and the administrator dies, the Trustees of the University cannot recover in their own name from the representative of such administrator. The assets can only be recovered by an administrator *de bonis non*, who is immediately answerable over to the Trustees, provided no claim be set up on the part of the next of kin.

The cases of *Goode* v. *Goode*, No. Ca. T. R. 255, *Taylor* v. *Brooks*, 4 Dev. & Bat. 139, and *Bratten* v. *Bateman*, 2 Dev. Eq. 115, cited and approved.

Appeal from the Superior Court of Law of Washington County, at the Spring Term, 1848, his Honor Judge SETTLE presiding.

This was an action of debt, brought upon the administration bond, which J. D. Bennett gave, with the defendants, as his sureties, upon obtaining letters of administration upon the estate of one James Baldwin. The plaintiff proved the execution of the bond. The evidence showed, that the said Baldwin emigrated to this Country from England in 1816; that about the year 1820 he came to the town of Plymouth, where he has constantly resided up to the time of his death, which took place in 1836; and that, shortly after his death, administration was committed to the said J. D. Bennett: that Bennett reduced his personal estate into possession, paid off the debts, and had a large balance in hand, due the distributees of said Baldwin, more than seven years before the commencement of this action; that the said Baldwin, at his death, left a wife, who was, at the time of his death, the only person known to be a distributee of the said Baldwin, and that Bennett had, before the commencement of this suit

paid over to one Asa V. Gaylord, with whom the widow of said Baldwin had intermarried, the distributive share due said Asa V. in right of his wife; say one third of the said Baldwin's personal estate; that no claim was ever made of the residue of the said estate by any other next of kin, until shortly before the commencement of this action, when administration *de bonis non*, was taken out upon the estate of the said Baldwin, by the plaintiff; Bennet having died some three or four years ago. The evidence showed that one Charles Baldwin, who is a resident of England, was the only next of kin of the said James Baldwin, except the widow, and that it had been more than seven years since the debts of the said intestate Baldwin had been paid off before the bringing of this action. The defendants objected that the plaintiff could not recover, because the funds had remained in the hands of the administrator more than seven years, and that the Trustees of the University were the only persons who could recover. His Honor Judge SETTLE charged the jury, that the relator of the plaintiff was entitled to recover, under the pleadings in the case. A verdict was rendered for the plaintiff. Judgment accordingly. Appeal to the Supreme Court.

Heath. for the plaintiff.
Iredell, for the defendants.

RUFFIN, C. J. The executor of Bennett, the first administrator of the intestate Baldwin, is liable to account to some person for two thirds of the assets, remaining at the death of Bennett in his hands; and the only question is, to whom he ought to account. For the defendants are liable, we suppose, on the administration bond, to the same extent and to the same person in this action, as the executor would be in a suit against him directly.

It seems to the Court, that precisely the same reasons apply as between the Trustees of the University and an

administrator *de bonis non*, which do between the latter and the next of kin. The rule is inflexible, that next of kin cannot call for an account and distribution of an intestate's estate, nor recover the specific property, without having an administrator before the Court, *Goode* v. *Goode*, No. Ca. T. R. 255. *Taylor* v. *Brooks*, 4 Dev. & Bat. 139. For the next of kin have only a right to the clear surplus after payment of all debts, and for protection of creditors an administrator must be before the Court. It was even doubted, whether, upon, the death of one of two administrators or executors, the representatives of the dead one were not so exclusively accountable to the survivor, that the next of kin of legatees could not sue them together. It was, indeed, held, that they could, upon the equitable principle of following the fund into whatever hand held it. *Bratten* v. *Bateman*, 2 Dev. Eq. 115. But there the administrator of the first intestate is a party, as well as the representative of the dead one. It may be admitted, that in like manner, when there is but a single administrator, and he dies, the next of kin may in a bill for an account join the representatives of the first administrator with the administrator *de bonis non*, and recover from each what he has. But there seems to be no case in which a distributive share, as such, can be recovered but from an administrator, either original, or *de bonis non*. Now the Trustees of the University take the place of legatees and next of kin in claiming the estate, and can only recover by the same remedies. They cannot, for example, bring an action at law for the surplus, as a creditor might sue for his debt. Suppose the estate here to have consisted of slaves on hand at the death of Bennett, undoubtedly the Trustees could not have maintained trover or detinue for them against any one else, more than they could against Bennett himself. It is said, indeed, that here the debts were paid. But that must mean all known debts, and cannot change the principle. The subject matter, being the administration of an estate, is of equitable cognizance

and the accounts must be duly taken, before it can be known what the residue is. If the Trustees of the University had obtained a decree against Bennett in his life time, and it remained unsatisfied, that might be a breach of the administration bond, for which the Trustees could put it in suit against Bennett's executors and sureties So, perhaps, if it appeared that Bennett had committed an actual *devastavit*, the Trustees might have had this action upon a suggestion of that breach in Bennett's life time. But for a balance merely remaining in his hands, unadministered and not demanded before his death, no claim, we think can be made by the Trustees but through an administrator *de bonis non.* That is so on principle; and it is likewise so upon the statute under which the Trustees derive their title. The Act of 1836 provides that all the estate remaining in the hands of any executor or administrator for seven years after his qualification, unrecovered or unclaimed by creditors, legatees, or next of kin, shall *by the said executor or administrator* be paid to the Trustees of the University, Rev. St. ch. 46, sec. 20. Those words construed even without reference to the previous rules of law or legislative enactments, plainly give a claim to the Trustees only against a representative of the first intestate or testator, and not against the representative of the former representative. True it may be, that, after one administrator has held the estate seven years, it is not to rest seven years more in the hands of an administrator *de bonis non*, but the Trustees may treat the latter as administering in trust for them, as, but for the statute, he would have done for the next of kin. But, still, the provision is precise, that the estate is to go to the Trustees from the hand of an executor or administrator of the original owner; and that such was the intention of the act is not only to be deduced from the words, as they now stand, but is rendered evident by the contrast in that respect between the act of 1836 and that of 1809, from which the latter one

was taken. The original act, Rev. Code C. 763, authorised the Trustees to sue for and collect the estate from any executor or administrator of a deceased person *or the representative of such executor or administrator*. Though no suit by the Trustees is remembered against an administrator of an administrator, without having an administrator *de bonis non* before the Court, yet we suppose, that by force of the postitive provision of the act of 1809 such a suit would have lain. But, as it required a statute to change the law in that respect, it must be inferred that in omitting that provision in the Revision of 1836, there was a purpose to restore the old rule, as necessary to the harmony of the different parts of the law. At all events, that is the effect of the repeal by the act of 1836 of that part of the act of 1809; and there can be litt'e question, that the reason for the repeal was to reinstate the salutary principle, that to the administration of any and every part of an intestate's estate an administrator of some kind is indispensable. Therefore the judgment ought to be affirmed.

Per Curiam. Judgment affirmed.

LEWIS FUTRELL *vs.* CHARLES VANN.

A master of an apprentice cannot assign or transfer his right over the apprentice to another person.

It being unlawful to remove a colored apprentice from one County to another, no action, founded on a contract for such removal, can be supported

The cases of *Sharpe* v. *Farmer*, 4 Dev. & Bat. 122, and *Blythe* v. *Lovinggood*, 2 Ired. 20, cited and approved.

Appeal from the Superior Court of Law of Hertford County, at the Fall Term, 1847, his Honor Judge DICK presiding.

The plaintiff lived in the County of Northampton. A colored boy, by the name of Joe Walker, was bound to him for a term of years, by the Court of that County. Before the expiration of the term of service, the plaintiff sold the unexpired residue to the defendant, who lived in the County of Hertford, and where the contract was made. By the contract, it was stipulated, "if the boy did not serve the whole of the unexpired period, then the defendant should pay for the time the boy did serve, at the rate he was to give for the whole of the time, for which he had contracted." The defendant had the boy in his possession in Hertford County, where he was carried by the plaintiff. Before the expiration of the time, for which the boy was indentured, he returned to the possession of the plaintiff. The action is brought to recover compensation for the services of the boy, Walker, for the time he was in the actual employment of the defendant. The plaintiff proved, that his account was presented to the defendant, who objected, that he was entitled to a credit for some clothing furnished the boy,

and he promised, *if the plaintiff would allow him that credit, the account would be correct and he would pay it.* The credit was allowed by the plaintiff.

The defendant objected to the plaintiff's recovery, 1st, because the contract was a specific one for the whole remaining portion of the term of apprenticeship, and that he had deprived the defendant of the benefit of his contract, by *receiving* the boy, before the term expired; 2nd because the consideration, upon which the contract rested, was illegal, as, by the terms of indenture, it was unlawful for the plaintiff to remove the boy out of the County of Northampton, and that, under the contract, the boy had lived with, and served him in the County of Hertford, about fourteen months.

His Honor, the presiding Judge, instructed the jury, that if the contract was, that the boy should serve the defendant the whole of the unexpired portion of the time, for which he was bound to the plaintiff, and that contract had not been modified or altered by the parties, the plaintiff could not recover. But if, at the time it was made, it was agreed that the defendant should only pay for the time the boy served him, at the rate he was to pay for the whole time: or if the contract was subsequently altered, or modified by the parties, so as to make the defendant liable only for the time the boy served him, then the plaintiff would be entitled to recover for the services of the boy for the time he actually served the defendant.

There was a verdict for the plaintiff and from the judgment thereon the defendant appealed.

No counsel for the plaintiff.

W. N. H. Smith, for the defendant.

NASH, J. We see no just ground of complaint, on the part of the defendant, of the charge. The law, we think, has been properly administered, and we agree entirely

with the presiding Judge. His Honor has not given us the reasons, upon which his decision rests nor could he, indeed, with any propriety, so do, as they properly constitute no part of the case. Our only enquiry is whether there is error in the law, as charged by him. In this case the charge is precise, lucid, and, unencumbered with extraneous matter.

If the original contract had been, as it is treated by the defendant, one for the unqualified transfer to the defendant of the unexpired term of the apprentice, the first objection, raised by the defendant, would unquestionably be sound, and the plaintiff could not recover. The binding out of an apprentice to a particular person is from confidence in the party to whom he is committed, that he will not only instruct him in his trade or business, but will also be careful of his health and safety. It is therefore such a personal trust, that the master cannot assign or transfer it to another. 4 *Bac. Abr. Tit.* Master and servant, *Letter E. Page* 577. 1 *Mass. R.* 177. *Hall and Hall* v. *Gardner and others, Davis* v. ———, 8 Mass. R. 299, Hobarts R. 134, *Coventry* v. *Goodall.*

The second objection, on the part of the defendant, is equally true in principle. By the act of 1801, Rev. Stat. ch. 5, sec. 7, when the County Court shall bind out any orphan child of colour, they shall take bond with sufficient security in the sum of five hundred dollars, from the master or mitress, that they shall not remove said child out of the County, &c." It is therefore illegal for any master or mistress to *remove* such apprentice out of the County, wherein he was indentured; and, such removal being illegal, no action can be founded on a contract for such removal. The cases of *Sharpe* v. *Farmer*, 4 Dev. & Bat. 122, and *Blythe* v. *Lovinggood*, 2 Ired. 20, cited at the bar, by the defendant's counsel, fully sustain his proposition. But, we think, the case before us steers clear of each of those objections. The action is not brought to enforce the contract, originally made: that was

illegal and could not sustain an action. But it is brought upon the assumpsit of the defendant, made after the original contract was rescinded, as it appears by mutual or tacit consent, and upon a sufficient legal consideration.

From the terms of the original contract, the parties seem to have been fearful, they were doing what the law would not sanction, and therefore it is provided, that if the boy did not serve out his full term, the defendant should pay only for the time he did serve. A *locus penitentiæ* is therefore provided for the plaintiff. He availed himself of it, and the contract was put an end to. But the defendant, has enjoyed the services of the plaintiff's servant, and in consideration thereof the defendant agreed to pay him for those services an ascertained sum; to-wit, the amount of the account presented by the plaintiff. The case of *Sharpe* v. *Farmer*, above cited, was where the action was directly upon the original contract. The next of kin of one ——— Farmer, agreed that the defendant, without administering, should sell the property and pay the debts and divide the residue among those entitled, the plaintiff being one. The action was brought for his distributive share. The Court declared the contract void, because in violation of a public law. So in the case of *Blythe* v. *Lovinggood*. At a sale of public lands, where the terms were, if the highest bidder did not comply with his bid, the next highest should have the land, the plaintiff was the highest, and the defendant the next highest bidder. It was agreed between them, that the plaintiff should refuse to comply with his bid, and in consideration thereof, the defendant should give him $120, for the payment of which he executed his note; and the conveyance of the land being made to the defendant, the action was brought upon the note, and the Court decided that the agreement was a fraud upon the State and the note was void. In each of these cases the action was

upon the original contract. Here, the original contract was put an end to by the parties themselves, and the action is brought upon one made subsequently, and as we think upon a sufficient consideration.

In his first objection in addition to the ground that the assignment was void, the defendant insists that the plaintiff received the boy back into his care, before the time had expired for which he had contracted, and that thereby the plaintiff had deprived him of the benefit of his contract. The answer is, that by the terms of the contract, he was to pay only for the time he had the boy. As before remarked, the parties had provided *locus penitentiæ*. They contracted in view of the fact that the boy might not serve out his time with the defendant, and the contract was by mutual consent rescinded.

PER CURIAM. Judgment affirmed.

MEMORANDA.

In May 1848, the Governor, with the advice of the Council of State, appointed the Honorable WILLIAM H. BATTLE, one of the Judges of the Superior Courts to be a Judge of the Supreme Court, to supply the vacancy occasioned by the death of the Honorable Judge DANIEL.

At the same time and by the same authority, AUGUSTUS MOORE, Esquire, of Edenton, was appointed a Judge of the Superior Courts of Law and Equity, to supply the vacancy occasioned by the promotion to the Supreme Court Bench of the Honorable WILLIAM H. BATTLE.

And BARTHOLOMEW F. MOORE, Esquire, of Halifax, was appointed Attorney General, to supply the vacancy occasioned by the resignation of EDWARD STANLY, Esquire.